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An Reynolds v. NFL: An Unsettling Requiem for the Rozelle Rule

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Reynolds v. NFL:
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The public image of the professional athlete has undergone a radical transformation over the last twenty years. Once the subject of blind idolatry, the athlete was knocked off his pedestal in the 1960's largely through media exposure which revealed an all too human susceptibility to ordinary temptations. In the 1970's, professional athletes fought hard to gain the dignity of controlling their own destinies, as well as to realize their financial worth.[1] Today they are often seen as greedy entrepreneurs in a different American tradition.[2]

Nowhere has the transformation been more visible than in professional football. National Football League (NFL) Commissioner Pete Rozelle disciplined three star players for suspected gambling connections during the 1960's.[3] In 1968 the

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* Member, Third Year Class.

1. In 1978 the average salary in the NFL was $62,585. S.F. Chronicle, Jan. 31, 1979, at 55, col. 4. The top ten salaries were as follows:

O.J. Simpson	$733,358
Walter Payton	$431,500
Fran Tarkenton	$360,000
Dan Pastorini	$358,333
Ken Stabler	$342,000
Larry Csonka	$300,000
John Riggins	$300,000
Bob Griese	$260,000
Bert Jones	$250,000
Franco Harris	$250,000

Miller, *How Much They Made in the NFL*, S.F. Chronicle, Feb. 6, 1979, at 45, col. 1. *See generally* Brody, *The Impact of Litigation on Professional Sports*, TRIAL, June 1978, at 35-38.

2. According to a recent fan opinion poll conducted for SPORTS ILLUSTRATED, most fans believe the players are overpaid (62%), and are "greedier and more self-centered than they used to be" (67%), but the majority also believe that players are now smarter (69%), and that it is "acceptable" for them to earn "hundreds of thousands of dollars" each year (68% in reference to individual sports, and 58% for team sports). Kennedy & Williamson, *The Fans: Are They Up In Arms?*, SPORTS ILLUSTRATED, July 31, 1978, at 34, 42.

3. Paul Hornung, Alex Karras, and Joe Namath were the players involved. Garvey, *The NFL Money Game: Players Want More*, S.F. Chronicle, Feb. 16, 1979, at 74, col. 2.

National Football League Player's Association (NFLPA) emerged as a viable, powerful union,[4] and began its struggle for "dignity."[5]

The focal point of the player-owner conflict was the league Commissioner's authority to effectively bind a player to his present team under the operation of the Rozelle Rule.[6] This controversy was finally settled by the courts in *Mackey v. NFL*,[7] where the Rozelle Rule was found to be invalid under the antitrust laws. With this victory in hand, the NFLPA sponsored a class action by past and present players to recover damages caused by the antitrust violation. The class action was settled and given judicial approval in *Alexander v. NFL*.[8] However, some players were dissatisfied with the settlement and appealed. This gave the Court of Appeals for the Eighth Circuit, the same court which had earlier decided *Mackey*, an opportunity to emphasize its belief in the collective bargaining process as the proper method of player-management dispute resolution.

Although the new Collective Bargaining Agreement was not a part of the *Alexander* settlement, and hence not before the court, the Eighth Circuit made it clear in *Reynolds v. NFL*[9] that the Agreement's new player restraint rule,[10] replacing the invalidated Rozelle Rule, would be immune from antitrust scru-

4. L. SOBEL, PROFESSIONAL SPORTS & THE LAW 276-78 (1977) [hereinafter cited as SPORTS & THE LAW]. The NFLPA gained official recognition as the players' exclusive bargaining representative by NLRB certification in Jaunary of 1971. Collective Bargaining Agreement between the NFLPA and the National Football League Management Council (NFLMC) (Mar. 1, 1977), Preamble [hereinafter cited as Collective Bargaining Agreement].

5. Garvey, *supra* note 3, at 74, col. 2. Mr. Garvey is the executive director of the NFLPA.

6. See notes 65-71 and accompanying text, *infra*. *See* Goldstein, *Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports*, 4 PEPPERDINE L. REV. 285 (1977); Note, *National Football League Restrictions on Competitive Bidding for Players' Services*, 24 BUFFALO L. REV. 613 (1975); Note, *The Legality of the Rozelle Rule and Related Practices in the National Football League*, 4 FORDHAM URBAN L.J. 581 (1976).

7. 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

8. 1977-2 Trade Cases ¶ 61,730 (D. Minn. 1977).

9. 584 F.2d 280 (8th Cir. 1978).

10. The Right of First Refusal/Compensation Rule, Collective Bargaining Agreement, *supra* note 4, art. XV. See notes 246-58 and accompanying text, *infra*. For an evaluation of the new rule from an antitrust perspective, see Roberts & Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 451-67 (1978).

tiny under the labor exemption enunciated in *Mackey*. To evaluate the propriety of this judicial self-restraint in applying antitrust principles to player-owner controversies over rules governing player allocation, it is necessary to begin with an evaluation of the justifications behind league rules restraining inter-team player movement in professional team sports.

Player Loyalty, Team Continuity and Competitive Balance

"Slavery went out of style 100 years ago," commented basketball player Phil Ford after learning he had been drafted by the Kansas City Kings, an NBA team which he had, at least initially, little or no desire to play for.[11] Ford's reaction typifies the recent resentment harbored by many professional athletes toward the practice employed by all major professional team sports leagues[12] of exclusively assigning a player's services to a single team.[13]

Under each league's rules, a player may not, without the permission of his present team, negotiate with or contact any team other than the one with which he is presently under contract. Conversely, each team enjoyes the exclusive right to bargain for and retain the services of any player already under contract. There are undeniably some slavery-like qualities in the operation of the various systems of restricting inter-team player movement.[14] At the same time, professional sports

11. S.F. Chronicle, June 26, 1978, at 54, col. 1. Ford went on to explain, "I'm not trying to be cocky but my happiness is also important, and I can't see myself happy in Kansas City." *Id.* As of this writing, Ford appears content in Kansas City where he led the Kings to a first place finish in the Midwest Division of the NBA. He was also named Rookie of the Year for the 1978-79 season by a wide margin in media voting. S.F. Chronicle, May 17, 1979, at 53, col. 1.

12. For the purposes of this Note, "major professional team sports" or "major professional leagues" refer to baseball, basketball, hockey, and football. Together these leagues employ approximately 2,482 athletes. Kennedy & Williamson, *For The Athlete How Much Is Too Much?*, SPORTS ILLUSTRATED, July 24, 1978, at 34, 37.

13. Rod Carew, speaking about his ordeal while waiting to be traded, is another example: "it's nervewracking—the wait, the frustration—it's terrible, I want everybody to know I can't be bought, I am offended when I read all this stuff about the rich New York Yankees and that what George (Steinbrenner) wants, George gets." S.F. Chronicle, Feb. 2, 1979, at 55, col. 6. Carew has since been traded to the California Angels. Senator Sam Ervin's comments are also germane: "The reserve clause reduces a human being to a chattel, a possession like a piece of furniture. Management may sell a man, trade him for another piece of property, or dump him on the open market when it considers him of no more value. The player isn't a human being any more, just a depreciating asset, like a machine." SPORTS & THE LAW, *supra* note 4, at 235.

14. The various league rules are referred to generally herein as "player restraints."

leagues are dependent on their entertainment appeal, and athletes are performers in a contest played under imposed conditions before an audience expecting a standardized product, both at the stadium and on television. League officials have insisted that these restrictions have produced the requisite continuity essential to successful team sport entertainment. They have specifically contended that the presence of league-imposed restraints on player movement through the years,[15] was and still is, essential to team sports' entertainment value.[16] Three principal justifications are put forward in support of restraints on inter-team player movement: (1) preserving the competitive balance within the league; (2) promoting player loyalty and thus the integrity of the sport; and (3) preventing an uncontrolled bidding war between team owners for the best players' services.[17]

First, because team owners themselves engineer player trades which affect team strength, the effectiveness of player restraints in preserving a competitive balance is open to question. The simple reality is that the desired balance has never existed.[18] The initial justification for player restraints thus reduces itself to an intuitively attractive but unprovable theory.[19] Until effective equalization measures are imple-

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The phrases "reserve clause" and "option clause," although having a more narrow technical meaning (referring to specific standardized clauses in player contracts), are frequently used interchangeably with "player restraints" in other sources. For a detailed examination of the NFL's system of player restraints, see notes 53-64 and accompanying text, *infra*.

15. The evolution of these rules (commonly called "reserve clauses") can be traced back to a secret agreement among baseball owners in 1879. Each team owner simply agreed to let each of the other owners "reserve" the contracts of five players, ensuring each owner the exclusive contractual rights to the designated players. The number was later increased to 11 in 1883, to 12 in 1885, and finally to 14 in 1887. Canes, *The Social Benefits of Restrictions on Team Quality*, in GOVERNMENT AND THE SPORTS BUSINESS 81, 84 (R. Noll ed. 1974).

16. *See* Petition for Writ of Certiorari, at 5, Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

17. Canes, *supra* note 15, at 82 n.2; SPORTS & THE LAW, *supra* note 4, at 229-30. *See also* Petition for Writ of Certiorari, at 5, Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

18. "Doggedly, despite all evidence to the contrary, the guardians of the professional games have always maintained that any tinkering with the system would upset the 'delicate mechanisms of competitive balance.' Reserve clause, antitrust, merger, any and every issue is, it seems, reason for them to unfurl the banner of competitive balance. There is only one response to the wailing: What competitive balance?" Kennedy & Williamson, *Money the Monster Threatening Sports*, SPORTS ILLUSTRATED, July 17, 1978, at 28, 80.

19. This has led one commentator to conclude: "The theoretical conclusion is that the reserve clause could balance competition only if player trades and sales were pro-

mented,[20] it is doubtful that any significant balancing of team playing strengths will occur, and the effectiveness of player restraints in preserving a nonexistent competitive balance on the playing field will remain, at best, open to speculation.[21]

Secondly it is contended, restrictions on inter-team player movement foster player loyalty and enhance the integrity of the sport. Initially it was argued that by binding a player to a particular team he would be more likely to develop long term loyalty to the team and its fans. Thus, the chances of his "cheating" would be correspondingly reduced.[22] Perhaps because proponents of player restraints have realized that an athlete predisposed toward cheating in violation of league rules is unlikely to change his ways as a result of other league-enforced rules, the modern justification centers on appearances. For example, if a player, after recent contract negotiations with other clubs (prohibited under conventional player restraints)[23] were to have a very poor performance which materially enhanced the position of one of the teams with whom he had just negotiated, his loyalty and motivation might be doubted.[24] The resulting suspicion and possible accusations, it is argued, would greatly undermine the appearance of integrity

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hibited—certainly an undesirable and unenforceable proposition. Empirical investigations find no discernible relation between the closeness of competition on the field and the degree of competition in the market for players." Noll, *Alternatives in Sports Policy*, in GOVERNMENT AND THE SPORTS BUSINESS 411, 415 (R. Noll ed. 1974).

20. The D.C. Circuit Court of Appeals, while assessing the impact of the player draft, commented, "we think that two factors contribute at least as much as the player draft in producing and maintaining a competitive balance in the league— *television* revenues and *coaching* changes." Smith v. Pro Football, Inc., 593 F.2d 1173, 1184 n.46 (D.C. Cir. 1978) (emphasis in original). Interestingly, in the 1978-79 season the NFL, through utilization of a "parity" scheduling formula (under which the teams with the poorest won-lost records the previous year were given the easiest schedules), did achieve significant strides toward team equalization.

21. Football players have begun to question the competitive desires of team owners, alleging that the $5 million in television revenues guaranteed each team for each of the next four years has taken away the economic incentive to win. Oates, *The NFL's TV Deal: Winning Isn't Everything*, S.F. Chronicle, Aug. 2, 1978, at 51, col. 1. See text accompanying note 265 *infra*.

22. Cheating by professional players takes two principal forms: "point shaving," where a player purposely scores fewer points than he is able to, typically at the behest of a gambler trying to beat the "point spread"; and "throwing" games where a player intentionally tries to lose.

23. Recent "reserve" or "option" clauses specify certain negotiation periods when a player is free to bargain with other teams. *E.g.*, Collective Bargaining Agreement, *supra* note 4, art. XV, § 7 (Feb. 1 to Apr. 15).

24. *See* Noll, *The Team Sports Industry: An Introduction*, in GOVERNMENT AND THE SPORTS BUSINESS 1, 4 (R. Noll ed. 1974).

of the sport.[25]

The answer to this contention is twofold. Under existing league structures gambling or cheating is prohibited and its occurrence has been rare;[26] moreover, when suspicions are aroused, for whatever reasons, the best way to alleviate them and restore integrity is through more direct measures such as investigation and closer monitoring.[27] A player's loyalty to his team and its fans is a desirable end in itself.[28] However, such affinity cannot be produced involuntarily, and hence cannot be a serious justification for the imposition of player restraints.

The final justification at the center of the controversy over player restraints is prevention of uncontrolled bidding in order to ensure a competitive league comprised of the maximum number of profit-making teams. The fear is that the wealthiest owners, left unbridled, would soon have all the quality players under contract. Before too long all but the most attractive teams would be unable to compete on the playing field,[29] and the league would thus be doomed to financial ruin. Implicit in this argument are two premises: first, that the wealthier, more attractive teams, offering desirable climates, coaching, facilities and other benefits, will indeed sign all the talented players possible, and, secondly, that the resulting concentration of talent will reduce consumption of the entertainment product.[30]

Assuming for the moment that run-away league champions will result from the first premise, the latter premise does have

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25. *See* SPORTS & THE LAW, *supra* note 4, at 230.

26. *See id.*

27. "In sum, gambling is prohibited and is policed, and suspicions can and have arisen from irrational sources and even from league efforts to dispel it. Thus, using reserve and option systems to dispel suspicion, particularly on the theory that players will be suspected of cheating for future employers, is an unnecessary, ineffectual and overly burdensome thing to do." *Id.* at 232.

28. To the fans, a mediocre yet familiar player may sometimes be preferable to an unappreciative superstar waiting to jump at the chance to move on to another city for more money. But league rules have long allowed player transfer via trades regardless of fan sentiment. A player's loyalties are simply unrelated to the presence of player restraints. For an analysis of this and related questions, see Note, *Keeping The Illusion Alive: The Public Interest In Professional Sports*, 12 SUFFOLK U.L. REV. 48 (1978).

29. "Attractive" is used here broadly, and includes any characteristic generally attractive to athletes, such as location, economic or social climate, winning reputation, or high salaries. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1203 (D.C. Cir. 1978) (MacKinnon, J., concurring and dissenting) for a more detailed analysis of the factors that contribute to team attractiveness.

30. *See* SPORTS & THE LAW, *supra* note 4, at 225.

some empirical support.[31] The crucial question is thus whether the elimination of restrictions on inter-team player movement would result in a disproportionate number of the best players congregating on the few most desirable teams, and if so, how would this affect the sports' popularity? The conventional answer, and the one still apparently accepted by the courts,[32] is that a few teams would acquire the best players and this would inevitably cause a decrease in public interest, consumption, and total league revenues. However, the first premise does not find support in economic theory.[33] The economically rational team owner already in possession of many talented players will offer to pay a talented free agent[34] only the marginal increase in revenue his acquisition would produce. Because the owner's already talented team is presumed to have been previously successful, the offer to the free agent will be significantly less than the amount a losing team owner, devoid of talent, would offer the same player.[35] Hence, at least in theory, it appears unlikely that unrestricted player movement would cause the degree of talent concentration feared.

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31. "[T]he league as a whole will derive 50% more revenue from gate receipts if its pennant winner wins 57½% of its games rather than 75% of them." *Id.*

32. In the *Reynolds* decision, discussed at length at notes 156-207 and accompanying text, *infra*, Judge Gibson stated the following proposition without citing authority:

> Precise and detailed rules must of necessity govern . . . the acquisition, number and engagement of players. While some freedom of movement after playing out a contract is in order, complete freedom of movement would result in the best franchises acquiring most of the top players. Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades.

584 F.2d at 287. *See* Mackey v. NFL, 543 F.2d at 610-11; United States v. NFL, 116 F. Supp. 319, 324 (E.D. Pa. 1953); Smith v. Pro Football, Inc., 593 F.2d at 1207 (MacKinnon, J., concurring and dissenting).

33. *See* Quirk & Hodiri, *The Economic Theory of a Professional Sports League*, in GOVERNMENT AND THE SPORTS BUSINESS, at 33 (R. Noll ed. 1974).

34. As used in this Note, a free agent is a player free to negotiate. Subject to various league imposed restraints, teams may or may not be able to negotiate and/or enter a contractual agreement with the free agent.

35. [A] good player is worth more to a poor team, all other things being equal. While New York will have more good players, on average, than Memphis, they will not have them all, for the first good player in Memphis will have a greater impact on team revenues than adding another star to a star-studded New York team. What the final balance of talent will be is difficult to understand, but it will never be a situation in which most teams are completely uncompetitive, for that costs both the bad and the good teams, fan interest and revenues.

Economists R. Noll & B. Okner, quoted in SPORTS & THE LAW, *supra* note 4, at 227-28.

Of course, the presence of many non-economic factors renders all such predictions speculative to some degree.

It is precisely because of this uncertainty that many closely involved in professional team sports, including some players,[36] oppose any significant alteration of the status quo. After all, as a whole, the professional sports industry continues to prosper.[37] While some players do sincerely seek to change the system radically, ending their enslavement, others want nothing more than a greater share in this prosperity. Thus it is not surprising that money, not the ideal of free player movement, supplies the unity necessary to support attacks on player restraints. Under league-imposed restrictions on inter-team movement, players are unable to realize the full value they could command for their services in an open market. Beginning in the late 1960's, professional athletes began the assault on player restraints on two fronts: through antitrust actions[38] alleging that restraints operate as concerted refusals to deal or group boycotts[39] on the part of the league and its owners; and

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36. *Id.* at 235.

37. "[U]nder the terms of the National Football League's new television contract each of the 28 clubs will receive $20 million in the next four years—more than the average franchise was worth when Commissioner Pete Rozelle signed with the networks last year." Oates, *The NFL's TV Deal: Winning Isn't Everything*, S.F. Chronicle, Aug. 2, 1978, at 51, col. 3.

38. 15 U.S.C. § 15 (1976) provides in pertinent part: "*Any person* who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws may sue* therefor . . . ." (emphasis added.) There has been a veritable flood of sports antitrust litigation in recent years. With the exception of baseball (see notes 75-76 and accompanying text, *infra*) all major professional team sports have been found subject to the Sherman Act's prohibitions against "combinations . . . in restraint of trade," 15 U.S.C. § 1 (1976). *See* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971); Haywood v. NBA, 401 U.S. 1204 (1971); Robertson v. NBA, 556 F.2d 682 (2d Cir. 1977) (basketball); United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953); Radovich v. NFL, 352 U.S. 445 (1957); Kapp v. NFL, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Mackey v. NFL, 543 F.2d at 616 n.19; Alexander v. NFL, 1977-2 Trade Cases at 72, 984; Smith v. Pro Football, Inc., 593 F.2d at 1177 n.11; Los Angeles Memorial Coliseum v. NFL, 5 TRADE REG. REP. (CCH), ¶ 62,617 (C.D. Cal. 1979) (football); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Linesman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977); McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978) (hockey).

39. This imprecise concept may be generally defined as any form of concerted action on the part of competitors resulting in a refusal to do business ("to deal") with potential customers. Group boycotts are often held to be illegal *per se*. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Silver v. New York Stock Exchange, 373 U.S. 341 (1963). However, in the context of professional sports, courts have heard the proffered justifications behind the boycotts. Smith v. Pro Football, Inc., 593 F.2d at 1183-85; Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971). They have found the restraints to be legal on occasion. Deesen v. Professional Golfers

through formation of players' associations,[40] pooling strength to gain leverage at the bargaining table.[41]

The Rozelle Rule

Nowhere has the players' assault upon the citadel been more bitterly fought than in professional football.[42] To fully appreciate the system under attack, the history of player restraints in the NFL must be examined. Originally the league employed a perpetual reserve clause similar to the one employed at the time in baseball.[43] In effect, each team in the league could reserve a designated number of players with the assurance that no other club would sign them. A team's exclusive right to the services of any player so 'reserved' was unlimited in duration. In 1947, the league replaced the perpetual reserve rule with the option clause.[44] This clause, substantially unchanged to this date, is required in all NFL player contracts, and provides that at the expiration of the contract term, the club may renew the contract for an additional year.[45] At the end of that year a player is said to have "played out his option." He is then free to negotiate and sign with any other club.

In 1963, R.C. Owens played out his option with the San Francisco 49ers and subsequently signed with the Baltimore Colts. At that time the league rules were silent as to whether a team

Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966) (upheld boycott of players not playing in minimum number of tournaments); Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961) (upheld boycott of players participating in illegal gambling). *See* P. AREEDA, ANTITRUST ANALYSIS PROBLEMS, TEXT & CASES, 380-422 (2d ed. 1974); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 229-64 (1977); ANTITRUST ADVISER § 1.32 (C. Hill ed., 2d ed. 1978).

40. Briefly, the collectivization of professional players may be outlined as follows: (1) baseball players organized their present system in 1946, but Marvin Miller's appearance in 1966 as executive director marked the beginning of real power; (2) Bob Cousy created the NBA Players' Association in 1952, and it emerged as a viable power in 1963; (3) the National Hockey League Players' Association obtained a formal "Recognition Agreement" in 1967, some 10 years after its inception; and (4) the NFLPA organized in 1956 and solidified in 1968. SPORTS & THE LAW, *supra* note 4, at 267-76. *See generally* Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 LAW & CONTEMP. PROB. 3 (1974).

41. The increase in bargaining power gained by players' associations has, as a by-product, effectively emasculated the antitrust attack. *See* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

42. See text accompanying notes 66-77, *infra*.

43. SPORTS & THE LAW, *supra* note 4, at 111; Canes, *supra* note 15, at 87 n.16.

44. SPORTS & THE LAW, *supra* note 4, at 111 n.3.

45. Standard Player Contract For The NFL, para. 10 (1972).

in the 49ers' situation should receive any compensation. The NFL and its member clubs swiftly amended the league Constitution and By-Laws so that a team like the 49ers would never again be left without adequate compensation.[46] League Commissioner Pete Rozelle was given sole authority to compensate the free agent's former club with players and draft choices from the acquiring club. This provision of the NFL Constitution became known as the Rozelle Rule.[47] Though the two teams are initially free to work out a mutually agreeable solution, the specter of Rozelle's unreviewable discretion may have pressured some acquiring teams to accept less-than-optimum compensation.[48]

The Rozelle Rule is one of five devices employed by the NFL to control inter-team player movement. Collectively these devices comprise the so-called "reserve system."[49] Today the First Refusal/Compensation Rule[50] has replaced the Rozelle Rule, while the other components of the system have remained relatively unchanged. The second device is the annual player draft. This is the vehicle through which NFL teams acquire virtually all their players. Each team is allowed to select a single player, acquiring exclusive rights to the draftee's services, during each of 12 rounds.[51] The drafted player must either sign

46. SPORTS & THE LAW, *supra* note 4, at 111; Mackey v. NFL, 543 F.2d at 610.

47. The NFL prefers the formal bargaining name, the "player of like quality" rule. Petition for Writ of Certiorari, at 3, Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed [*sic*] a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

NFL Const. & By-Laws, art. XII, § 12.1(H).

48. From the Rozelle Rule's inception in 1963 through the 1974 season, 34 free agents signed with other teams. In 27 of those instances the teams involved were able to reach agreement on compensation. *See* Mackey v. NFL, 543 F.2d at 611. See note 65 and text accompanying notes 59-65, *infra*.

49. Note, *Professional Sports: Restraining the League Commissioner's Prerogatives In An Era of Player Mobility*, 19 WM. & MARY L. REV. 281, 289; Mackey v. NFL, 407 F. Supp. at 1004-05.

50. For a detailed discussion of the new rule, see notes 220-38 and accompanying text, *infra*.

51. The NFL player draft, as it was conducted in 1968, was recently held to violate the Sherman Act. The court, per Circuit Judge Wilkey, indicated that a less restrictive

with the team that drafted him or not play in the league that year.[52] To participate, the newly drafted player must, like any other NFL player, sign a standard player contract.[53] The third device employed by the reserve system is the standard player contract, which provides that the player will "comply with and be bound by" the league Constitution, By-Laws, and decisions of the league Commissioner.[54] Thus, before any athlete can be eligible to compete, he must agree to all the provisions of the 'reserve system' in addition to the Commissioner's power to make "final, conclusive, and unappealable" decisions.[55] Also contained in the contract is the option clause, the fourth restrictive device.[56] Not only is the player expressly bound by the league's rules, he must also agree to his club's power to exercise its options and renew his contract[57] for another year without his consent.

The reserve system also requires team owners to comply with its terms. They are prohibited from negotiating with any player under contract with another team, including the option year of the contract under the last restrictive device, the "tampering rule."[58] Because no team may "tamper" with the exclu-

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draft might be permissible; "a player draft can survive scrutiny under the rule of reason only if it is demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effects, or, at least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is *insubstantial*." Smith v. Pro Football, Inc., 593 F.2d 1173, 1188-89 (1978) (emphasis in original).

52. Under the current Collective Bargaining Agreement, a drafted player must receive a minimum salary offer (a "required tender") by June 7 following the draft on May 1 in order for the club to retain its exclusive right. Collective Bargaining Agreement, *supra* note 4, art. XIII, §§ 3-4. It must be emphasized that the discussion in the text is a description of the system as it existed under the Rozelle Rule, and at that time a drafted player had no similar means of escape. See notes 227-38 and accompanying text, *infra*.

53. NFL Const. & By-Laws, art. XV, § 15.6; Mackey v. NFL, 407 F. Supp. at 1004.

54. Standard Player Contract for the NFL, para. 4 (1972).

55. *Id.*

56. *Id.* at para. 10.

57. A player then was entitled to a minimum of 90% of his salary in the option year. Today the figure is 110%, and a veteran of four or more years is no longer required to have an option clause. See note 234, *infra*.

58. The tampering rule provides:

> If a member club or any officer, shareholder, director, partner, employee, agent or representative thereof, or any person holding an interest in said club shall tamper, negotiate with, or make an offer to a player on the Active, Reserve or Selection List of another member club, then unless the offending club shall clearly prove to the Commissioner that such action was unintentional, the offending club, in addition to being subject to all other penalties provided in the Constitution and By-Laws, shall lose its selection choice in the next succeeding Selection Meeting in the same round in which the affected player

sive rights held by another team to a player's services, all players are effectively bound to their present teams for the duration of the period under contract plus the option year.

In sum, the NFL reserve system allows players to change teams on their own volition in a single, narrowly defined manner. A player must first refuse to sign a new contract and play out his option year, then he may negotiate with any interested club.

Under the operation of the Rozelle Rule, assuming he could find acceptable terms with a desirable club, he then had to hope his new team either could reach agreement with his former club on compensation or was courageous enough to accept the Commissioner's wholly discretionary award of compensation.

The power given to the Commissioner under the Rozelle Rule is noteworthy. In the event the two clubs involved are unable to reach agreement "the Commissioner may . . . [award compensation] in his sole discretion . . . [and] such decision by the Commissioner is final and conclusive."[59] This broad discretionary authority is significant in two respects. First, the very existence of authority to award compensation when a free agent changes teams is not common to all professional team sports.[60] Secondly, it is indicative of the authorita-

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was originally selected in the Selection Meeting in which he was originally chosen. If such affected player was never selected in any Selection Meeting, the Commissioner shall determine the round in which the offending club shall lose its selection choice. Additionally, if the Commissioner decided such offense was intentional, the Commissioner shall have the power to fine the offending club and may award the offended club 50% of the amount of the fine imposed by the Commissioner. In all such cases the offended club must first certify to the Commissioner that such an offense has been committed.

NFL Const. & By-Laws, art. IX, § 9.2.

Roy Kroc, owner of the San Diego Padres, ran into trouble with baseball's tampering rule. Near the end of yet another disappointing season, Kroc made the mistake of publicly voicing his plans to lure quality players to San Diego. He said he was "willing to spend $5 million to $10 million" and specifically would "try signing Graig Nettles and Joe Morgan if they became free agents this fall." S.F. Chronicle, Aug. 14, 1979, at 46, col. 4. Because Morgan and Nettles were still under contract and had not attained free agent status, Kroc was disciplined by the league for tampering. Despite Kroc's apologies to the clubs involved and to the league for his "slip of the tongue," he was fined $100,000 and has decided to relinquish control of the team to his son-in-law. Kroc, founder and chairman of McDonald's, concluded, "[t]here's a lot more future in hamburgers than in baseball." S.F. Chronicle, Aug. 25, 1979, at 42, col. 3.

59. NFL Const. & By-Laws, art. XII, § 12.1(H).

60. Although hockey and basketball have similar compensation rules, baseball does not, and this may be a major reason why football can achieve greater team continuity. One sports writer believes "the reason for so little activity in football's free

rian manner in which Rozelle has steered the NFL on a course toward continuing financial success while skillfully placating the competing interests of the fans, players, and owners.[61] Nonetheless, it is true that Rozelle was chosen by the owners from their own ranks,[62] and it is apparent that at least some of his sympathies still lie in that direction.[63]

In practice, Commissioner Rozelle was rarely called upon to exercise his discretionary power;[64] but there is no better indication of the Rozelle Rule's restrictive impact on player movement than the infrequency of its implementation. For once team owners became aware of the strict price the Commissioner was likely to exact, typically the team's high draft choices in future drafts, even the most talented free agents were seldom worth the price.[65] The Rozelle Rule, as imple-

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agent market—as opposed to baseball's—has to do with compensation. Baseball teams don't have to compensate a player's old team when they sign a free agent. NFL teams do." Miller, *Compensation Slows Football Free Agents*, S.F. Chronicle, Apr. 24, 1978, at 45, col. 1.

61. Rozelle comments, "In this job, you're going to make someone reasonably happy or not so happy with everything you do that affects them. . . . What we try to do here is reject those policies that would give an inordinate edge to any one of the three [fans, players and owners]. We've got to keep a balance so that all three get a fair shake." Grunwald, *Pete Rozelle: Supersalesman Behind the Superbowl*, Marin County Independent Journal, Jan. 21, 1979, (Family Weekly) at 6, col. 4.

62. Rozelle was general manager of the Los Angeles Rams at the time of his selection as Commissioner in 1960. *Id.* at col. 1.

63. An example of Rozelle's tendency to view matters from the owners' perspective is his reaction in 1971 to the proposal to lift the television blackout of home games: "If a club announced in advance of its ticket sales, that all of its home games would be telecast locally the impact on ticket sales for the season or on a game-by-game basis could be dramatic. Fans could hold back on the buying of tickets to await the progress of the team during the season, skip cold weather games, buy tickets only to particular games of their choice, and generally keep the ticket sale pattern in a state of continuing confusion." Letter to Cornell Law Review, reprinted in *Blackout of Sporting Events on TV: Hearings Before Subcomm. on Communications of Senate Comm. on Commerce*, 92d Cong., 2d Sess., 189-90 (1972).

64. The Commissioner made compensation awards on only four occasions during the operation of the Rozelle Rule. *See* Mackey v. NFL, 407 F. Supp. at 1004.

65. Two examples are illustrative: In 1967 David Parks played out his option with the San Francisco 49ers and eventually signed with the New Orleans Saints in 1968 as a free agent. Despite the fact that Parks was past the peak of his career, when the clubs failed to reach a compromise, Rozelle awarded Kevin Hardy, the Saints' 1969 first round draft pick. By 1972, when Dick Gordon of the Chicago Bears attained free agent status, the chill of Rozelle's past awards was pronounced. Although Gordon was sought by many teams, none would agree to sign him, apparently believing that the Bears would never agree to fair compensation as long as an award from the Commissioner was an alternative. The result was that Gordon remained unsigned as the 1973 season began. At this point Rozelle, diagnosing the cause of the impasse, announced that his compensation award would be a first round draft pick. Gordon was eventually

mented by Commissioner Rozelle, went beyond its original purpose as an ostensibly neutral tool for resolution of disputes between NFL clubs over reasonable compensation. Through excessively harsh awards, Rozelle used the rule more as an effective means of deterring teams from signing free agents. Despite the existence of the option clause, players were unable to realize the value their services might otherwise command.

Shortly after entering the four year 1970 Collective Bargaining Agreement, the National Football League Player's Association (NFLPA) became increasingly militant in its demands for greater player freedom.[66] It was the NFLPA's dogged determination to prevail on the "freedom issues,"[67] especially the elimination of the Rozelle Rule, the option clause, and the Commissioner's power as final arbiter of all disputes,[68] which led to the longest players' strike in the history of professional sports, July 1 through August 11, 1974.[69] The strike ended only because the NFLPA agreed to an indefinite cooling off period and to play the 1974 season.[70] Animosities continued, and bargaining remained unproductive until agreement was finally reached almost three years later on March 1, 1977.[71] During the interim the NFLPA filed with the NLRB an unfair labor practice charge against the owners' bargaining representative, the National Football League Management Council (NFLMC) alleging, *inter alia*, refusal to bargain in good faith.[72] But it was not through resort to labor law that real progress was made.

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signed by the L.A. Rams. As a plaintiff in *Mackey*, Gordon was found to have been damaged by the Rozelle Rule. *Id.* at 1011.

66. SPORTS & THE LAW, *supra* note 4, at 279.

67. Initially this term appeared to mean simply contractual freedom. But it later became an emotional rallying cry for the players and soon encompassed freedom in the broadest sense. Then NFLPA president Kermit Alexander's reaction to the player's victory on the "freedom issues" in *Mackey* is typical. "This decision confirms that we have been right all along on the freedom issues. The Rozelle Rule is anti-American, and the court has seen fit to strike it down." *Mackey Claims Victory for Every American*, THE AUDIBLE, Jan. 1976, at 3, col. 3. The lead plaintiff, John Mackey, remarked that "this was a victory for every American. It means that large corporations cannot own people. It proves that truth, justice and freedom still prevail." *Id.*

68. SPORTS & THE LAW, *supra* note 4, at 280. *See* Goldstein, *supra* note 6.

69. SPORTS & THE LAW, *supra* note 4, at 279-85.

70. *Id.* at 286.

71. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at p. 72,997 (D. Minn. 1977).

72. NLRB Case No. 2-CA-13379, *reprinted in* FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. REP. NO. 94-1786, 94th Cong., 2d Sess. (1977). *See* SPORTS & THE LAW, *supra* note 4, at 281, 287.

The NFLPA, as far back as January 1972,[73] had decided to pursue the alternative avenue of attack—filing an antitrust action. The courts have generally treated professional football as an ordinary business,[74] and the United States Supreme Court has specifically held the business of football, unlike baseball,[75] amenable to the antitrust laws.[76] Although resort to the judicial process was predictably time-consuming, the results proved far more advantageous to both parties than anything accomplished in collective bargaining. As will be seen below, it is unlikely that any agreement could have been reached without the impetus supplied by the *Mackey* decision.[77]

Mackey v. NFL: A Victory for Player Freedom?

In its January 1972 meeting, the NFLPA's Board of Representatives decided to take the Rozelle Rule to court.[78] Initially, the complaint asked for injunctive relief, monetary damages, and a class action recovery.[79] However, in the second amended complaint, the class action allegation was dropped.[80] The district court, per Judge Larson, found the Rozelle Rule to be an

73. *Player Association Reps Began Legal Action in 1972*, THE AUDIBLE, Jan. 1976, at 6, col. 2.

74. United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953) (television and radio broadcasts of football games are not immune from the antitrust laws); United States v. Pro Football, Inc., 514 F.2d 1396 (Temp. Emer. Ct. App. 1975) (ticket prices subject to wage-price guidelines).

75. Professional baseball was found not to be engaged in interstate commerce and hence not cognizable to the antitrust laws. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). Reasoning that if Congress had wanted to subject baseball to the antitrust laws they would have acted legislatively, the Supreme Court has reaffirmed the result of *Federal Baseball* on the principles of stare decisis. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972).

76. Radovich v. NFL, 352 U.S. 445 (1957). The Court's comments on *Federal Baseball* are instructive: "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time we would have no doubts [that it would be subject to the antitrust laws]." *Id.* at 452.

77. See text accompanying notes 133-39, *infra*.

78. John Mackey was then president of the NFLPA, and all the members of the Board of Representatives, with the exception of the Super Bowl participants, Miami and Dallas, joined him as named plaintiffs. By the time the District Court's opinion was announced on December 27, 1975, almost all of the named plaintiffs were either on different teams or out of the game entirely. *Player Association Reps Began Legal Action in 1972*, THE AUDIBLE, Jan. 1976, at 6.

79. Mackey v. NFL, 407 F. Supp. at 1000, 1002.

80. *Id. Cf.* Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730 (D. Minn. 1978), *aff'd sub nom.* Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978) (class action). See notes 140-43 and accompanying text, *infra*.

antitrust violation, and permanently enjoined its enforcement. It held that the plaintiffs were damaged in their person and property, but postponed determination of actual damages.[81]

Specifically, the court determined that professional football is subject to the antitrust laws,[82] and that the Rozelle Rule, in conjunction with the other restrictive devices contained in the NFL's reserve system,[83] operated as a concerted refusal to deal and as a group boycott by the team owners.[84] Further, the court found that such anti-competitive practices were *per se* violations of the Sherman Antitrust Act.[85] Alternatively, because considerable evidence was admitted on the issue of reasonableness, the court found the Rozelle Rule to be invalid under the Rule of Reason as well.[86]

Perhaps most significant was the court's rejection of the NFL's claimed labor exemption to the antitrust laws. At common law, and in the early years of the Sherman Antitrust Act, unionization and any type of concerted labor activity was seen as an unlawful conspiracy in restraint of trade.[87] When Congress passed the Clayton Act in 1914, it included an express antitrust immunity for most union activities, now known as the

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81. Mackey v. NFL, 407 F. Supp. at 1003. The *Alexander* settlement included $2,200,000 for the *Mackey* plaintiffs. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at p. 72,997 (D. Minn. 1977).

82. *Id.*

83. See notes 49-70 and accompanying text, *supra*.

84. Mackey v. NFL, 407 F. Supp. at 1007.

85. *Id.* The rationale for the *per se* treatment was outlined by the Supreme Court in Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958): "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." More specifically, the Court has found, "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' [citations]. Even when they operated to lower prices or temporarily to stimulate competition they were banned." Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

86. Mackey v. NFL, 407 F. Supp. at 1007. The Rule of Reason necessitates a full-blown judicial inquiry into the economics behind a challenged practice. The court must determine if a justifiable, procompetitive purpose exists and, if so, whether the restraint is more restrictive than reasonably necessary. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 186-97 (1977); Smith v. Pro Football, Inc., 593 F.d 1173, 1180 (D.C. Cir. 1978). See notes 95-103 and accompanying text, *infra*.

87. A. GOLDMAN, THE SUPREME COURT AND LABOR-MANAGEMENT RELATIONS LAW, 6-8, 12-14 (1976); R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING, 621 (1976).

labor exemption.[88] Nevertheless, union action continued to be found violative of the antitrust laws for some time.[89] Finally, aided by the clear Congressional mandate contained in the federal labor legislation of the 1930's, the labor exemption to the antitrust laws received judicial recognition in the early 1940's.[90]

Against this background, the court ruled that the NFL, as a non-labor group, could not escape antitrust liability through assertion of the labor exemption. Only labor groups, it reasoned, can claim the benefits of the labor exemption.[91] Even assuming arguendo that the NFL somehow could fall within its reach, the labor exemption was nevertheless held inapplicable for two reasons. First, the court found the Rozelle Rule was not a mandatory subject of collective bargaining because it was illegal under the antitrust laws,[92] and secondly, it was not the

88. 15 U.S.C. § 17; 29 U.S.C. § 52 (1976).

89. Because the statute applied only to individuals "lawfully carrying out legitimate objects," the courts were able to greatly narrow the exemption to union activity then felt to be "legitimate." Duplex Printing Co. v. Deering, 254 U.S. 443 (1921). This decision and its progeny "continued to deny full effect to Congress' intention to protect concerted labor activity. . . ." Note, *Labor Law—Antitrust—Application of Sherman Act to Labor Union*, 50 TUL. L. REV. 418, 420 (1976).

90. *See id.* at 422.

> The cumulative effect of the Norris-LaGuardia Act and the NLRA finally resulted in the Supreme Court's recognition of the congressional labor policy in two landmark cases. In a 1940 case, *Apex Hoisery Co. v. Leader* [310 U.S. 469 (1940)], the Court held that although the very nature of successful union activity tended to limit an employer's competitive freedom by eliminating price variance based on differences in labor standards, such side effects would not make a strike illegal under the Sherman Act. One year later, in *Hutcheson*, the Court, recognizing that the antitrust laws were unsuited for regulation of labor relations, held that a union's activities would be exempt from the antitrust laws so long as the union acted out of self-interest and did not combine with nonlabor groups to achieve its goals.

Id., citing United States v. Hutcheson, 312 U.S. 219 (1941).

Gradually, as the case law developed, the labor exemption was applied in contexts seemingly outside its statutory contours. Soon it became apparent that in reality two distinct labor exemptions existed. First, there was a comparatively narrow "statutory exemption" [15 U.S.C. § 17; 29 U.S.C. § 52 (1976)] protecting only specified union activities. Second, there was a judge-made exemption, broadly protecting federal labor policy. The existence of this latter "nonstatutory exemption" was recently made explicit in Connell Co. v. Plumbers and Steamfitters, Local 100, 421 U.S. 616, 622 (1975). See text accompanying note 105, *infra*. *See generally* R. GORMAN, *supra* note 87, at 621-38; Note, *Labor Law—Supreme Court Holds That Labor Unions Are Not Exempt from Antitrust Statutes*, 44 FORDHAM L. REV. 191 (1975).

91. Mackey v. NFL, 407 F. Supp. at 1008.

92. As the court of appeals pointed out, this conclusion was reached through circular reasoning. If upheld, it would completely eliminate the labor exemption, since application of the labor exemption presupposes an antitrust violation. Thus the very fact

product of serious arms-length bargaining.[93]

The judgment granting plaintiffs a permanent injunction was stayed pending appeal.[94] The district court's decision was hailed by the NFLPA as the "most important decision in the history of professional team sports."[95]

The Eighth Circuit opinion, decided some ten months later, affirmed the lower court's finding of antitrust illegality.[96] However, the court refused to mechanically apply the *per se* rule to professional football, reasoning that the unusual business characteristics of the sport rendered it inappropriate to apply a rule fashioned from traditional business precepts.[97] Additionally, it found lacking a key justification for the *per se* rule: avoidance of complex inquiries into the industry economics in question.[98] The district court had already devoted considerable time and energy to an investigation of the business of professional football.[99]

The court then examined the Rozelle Rule under the Rule of Reason.[100] Without deciding whether some form of inter-team compensation for voluntary player movement might be essential to the League's competitive balance, the court concluded

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of antitrust illegality cannot also be grounds for denying an established immunity to the operation of the antitrust laws. See notes 117-18 and accompanying text, *infra*.

93. Mackey v. NFL, 407 F. Supp. at 1008-10.

94. *Id.* at 1011.

95. *Rozelle Rule Illegal*, THE AUDIBLE, Jan. 1976, at 1, col. 3. Ed Garvey, executive director of the NFLPA, assessed the impact of the court's decision on the fate of the Rozelle Rule, "Bargaining won't make it legal; in all probability appeals won't make it legal. The fact is that professional football players are the first athletes in history to have freedom. The owners may delay it for awhile, but when they see 'light at the end of the tunnel' it will be an onrushing locomotive called the 'Freedom Express.'" Garvey, *Impact of Ruling Tremendous*, THE AUDIBLE, Jan. 1976, at 3, col. 2. It should be noted that appeal did produce a way for bargaining to make a similar rule legal. See note 197 and accompanying text, *infra*.

96. Mackey v. NFL, 543 F.2d at 606.

97. *Id.* at 619.

98. *Id.* at 619-20.

99. *Id.* at 620. The district court heard 63 witnesses, examined over 400 exhibits, and compiled a trial transcript of over 11,000 pages. 407 F. Supp. at 1002. The entire *Mackey* transcript was later incorporated into the *Alexander* record. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at p. 72,986 (D. Minn. 1977).

100. For more detailed analyses of the court's reasoning, see Note, *The Eighth Circuit Suggests a Labor Exemption From Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 ST. LOUIS U. L.J. 565, 570-78 (1977); Note, *Antitrust—Professional Football—The Rozelle Rule as an Unreasonable Restraint of Trade*, 26 U. KAN. L. REV. 121 (1977); Note, *The Sherman Act and Professional Team Sports: The NFL Rozelle Rule Invalid Under the Rule of Reason, Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*, 9 CONN. L. REV. 336 (1977).

that the Rozelle Rule "is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard."[101] The rule was found unduly restrictive in three aspects: (1) in its application to players of all levels of talent when only 'star' player movement was alleged to be destructive; (2) in its perpetual, unlimited duration; and (3) in its complete failure to provide procedural safeguards.[102] Because of these deficiencies, the Rozelle Rule, as enforced, was held to be an unreasonable restraint of trade within the meaning of the prohibitions of the Sherman Act.[103]

However, before finding the antitrust violation, the circuit court gave much more serious attention to the NFL's asserted labor exemption than did the district court.[104] Analysis proceeded in light of a recent United States Supreme Court decision, *Connell Co. v. Plumbers and Steamfitters, Local 100*,[105] which for the first time expressly stated that the labor exemption is actually comprised of two distinct exemptions. Justice Powell, writing for the majority in the 5 to 4 decision, found that the exemption consisted of both an express statutory immunity for certain labor activities,[106] and a nonstatutory ex-

101. Mackey v. NFL, 543 F.2d at 622.

102. *Id.*

103. *Id.* The Sherman Act reads in pertinent part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).

104. Mackey v. NFL, 543 F.2d at 622. *See* Mackey v. NFL, 407 F. Supp. at 1008-10.

105. 421 U.S. 616 (1975). *See* St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976).

106. 421 U.S. at 622. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 723 (1977):

> The labor exemption is also the product of several statutes. Section 6 of the Clayton Act [15 U.S.C. § 17 (1976)] states that labor is not an article of commerce and that the antitrust laws should not forbid labor organizations. Section 20 of that Act [29 U.S.C. § 52 (1976)] limits the power of federal courts to grant injunctions in labor disputes and lists certain labor activities which should not be held to violate any law of the United States. These activities include conventional labor activities such as ceasing to perform work or urging that others cease to patronize or to employ any party to a dispute or urging that others do. The Norris-LaGuardia Act [29 U.S.C. §§ 101-10, 113-15 (1976)], passed in 1932, contains a declaration of policy favoring freedom of employees to organize and further limits the jurisdiction of federal courts to grant injunctions in labor disputes. Because it is so directly related in purpose and effect to Section 20 of Clayton, the practices which Norris-LaGuardia protects from injunctions have been taken to be exempt under Section 20 from the antitrust laws. Read together, the two statutes thus grant antitrust exemption to a broad range of conduct of the kind traditionally engaged in by unions.

emption for collectively bargained employment agreements in furtherance of federal labor policy.[107] Because the statutory exemption is exclusively available to labor organizations, the NFL could claim only the latter exemption in *Mackey*.

The circuit court examined the rationale behind the nonstatutory exemption, an accommodation of competing congressional policies: one, favoring free competition, antitrust; and the other, a strong preference for collectively bargained employment agreements.[108] Next, it disagreed with the lower court, and determined that since the nonstatutory exemption is based on a national preference for collective bargaining, it must logically be available to both parties to a labor agreement.[109]

Having found the exemption to be potentially available to the NFL, the circuit court assumed, without deciding, that the Rozelle Rule was incorporated by reference into the 1970 Collective Bargaining Agreement.[110] At this point the court was squarely faced with a conflict between the antitrust laws and the national labor policy. The Rozelle Rule had a clear anticompetitive impact; at the same time, federal labor policy strongly favors collective bargaining agreements. The solution to this dilemma required a determination of "whether the relevant federal labor policy is deserving of preeminence over federal antitrust policy under the circumstances of the particular case."[111] In making this determination, the court extracted three guiding principles common to the Supreme Court decisions carving out the nonstatutory exemption.[112]

First the court of appeals found that if the labor policy was to prevail the challenged restraint must primarily affect only the parties to the collective agreement.[113] The decisive factor here

107. 421 U.S. at 622.

108. Mackey v. NFL, 543 F.2d at 611-12.

109. *Id.* at 612. This proposition has generally received approval from commentators. *See* Note, *supra* note 100, 21 ST. LOUIS U. L.J., at 588-89; Jacobs & Winter, *supra* note 41; Lowell, *supra* note 40. There is also support in the case law. *See* Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3d Cir. 1974).

110. Mackey v. NFL, 543 F.2d at 613. The court also determined that the Rozelle Rule was incorporated by reference in the 1968 agreement. *Id.*

111. *Id.*

112. *Id.* at 613 n.11. The Eighth Circuit relied on four cases in particular: Connell Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616, 622 (1975); Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, I.B.E.W., 325 U.S. 797 (1945).

113. 543 F.2d at 614.

is apparently whether the restraint affects only the employee or labor market, or whether it affects the product market as well.[114] The Rozelle Rule operates as a restriction on player movement, and the court readily concluded that it primarily affected only the parties to the collective agreements.[115]

The second principle required that the subject of the restraint be within the ambit of the command of the National Labor Relations Act to bargain on "wages, hours, and other terms or conditions of employment . . ." or "mandatory subjects" of bargaining.[116] Here the court of appeals overruled the district court's circular reasoning that the very fact of antitrust illegality precluded application of the labor exemption.[117] A mandatory subject of bargaining cannot be deemed nonmandatory for the purposes of taking it out of the labor exemption solely because it would otherwise violate the antitrust laws.[118] To so hold, concluded the court, would be to eliminate the nonstatutory exemption entirely. Because it operated to restrain inter-team player movement, to deflate demand for player services, and to keep wages artificially low, the Rozelle Rule was found to be a mandatory subject of bargaining.[119]

Application of the labor exemption then came down to the single issue raised by the third guiding principle, whether the

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114. *See* Note, *supra* note 100, 21 ST. LOUIS U. L.J. 565 (1977), where the author argues that this first principle should be determinative of the exemption issue. "The crucial distinction has always been the difference between restraining the employee or product market. This distinction should be used as a means of triggering an absolute labor exemption. Whenever the items of the collective agreement affect, and are meant to affect, primarily only the parties to the agreement, the labor exemption should be available. In such situations the balancing test should not be used. To do so would place the validity of the agreement in the hands of each succeeding court." *Id.* at 592.

115. Mackey v. NFL, 543 F.2d at 615.

116. *Id.*, quoting § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1976).

117. Mackey v. NFL, 543 F.2d at 615. *See* Mackey v. NFL, 407 F. Supp. at 1008. See note 92 and accompanying text, *supra*.

118. In the words of Judge Lay:

> In this case the district court held that, in view of the illegality of the Rozelle Rule under the Sherman Act, it was 'a nonmandatory illegal subject of bargaining.' We disagree. The labor exemption presupposes a violation of the antitrust laws. To hold that a subject relating to wages, hours and working conditions becomes nonmandatory by virtue of its illegality under the antitrust laws obviates the labor exemption. We conclude that whether the agreements here in question relate to a mandatory subject of collective bargaining should be determined solely under federal labor law.

543 F.2d at 615.

119. *Id.*

Rozelle Rule was the "product of bona fide arms-length bargaining."[120] Here the court examined the district court's findings and found substantial evidence to support them based on the circuit court's independent review of the record.[121] Because the NFLPA's comparatively weak financial position resulted in a bargaining disadvantage, and because the Rozelle Rule was unilaterally created by the league, the rule was not the product of bona fide arms-length bargaining.[122] The court specifically rejected the NFL's argument that the rule was a quid pro quo for increased pension benefits and the right of players to individually negotiate their salaries.[123] In sum, the court found nothing in the record to warrant disturbing the district court's findings of fact. The Rozelle Rule was never the product of arms-length bargaining and hence, the court held, could not fall within the protection of the nonstatutory labor exemption to the antitrust laws.[124]

Significantly, the circuit court explicitly encouraged the parties to "resolve this question through collective bargaining."[125]

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120. *Id.* In support of this principle the court quoted from Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676 (1965): " 'Thus the issue in this case is whether the . . . restriction . . . is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through *bona fide, arms-length bargaining* in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.' " 543 F.2d at 615 n.15 (emphasis added). The NFL vigorously opposed this interpretation. "The use of the words 'bona fide arms-length bargaining' in one passage of the opinion in *Jewel Tea* provides no basis for the third immunity requirement imposed by the Court of Appeals in this case." Petition for Writ of Certiorari, at 15-16, Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976). On the other hand, the quotation has been applauded with equal vigor. "It is significant to note at this point that that the *Mackey* court took pains to set forth the above quote from Justice White's opinion in order to elucidate the meaning the court gave to the phrase 'product of bona fide arms-length bargaining.' Plainly the principle stated by the *Mackey* court was meant to encompass two concepts: first, that an agreement can neither be unilaterally imposed upon a union such as a company dominated situation, or be the result of a conspiracy with employers as in *Pennington*; and second, that the agreement entered into by the union be in pursuit of its own policies, *i.e.*, 'self interest.' " HOUSE SELECT COMM. ON PROFESSIONAL SPORTS, INQUIRY INTO PROFESSIONAL SPORTS, H.R. REP. NO. 94-1786, 94th Cong., 2d Sess., 29 (final Report 1977) citing United Mine Workers v. Pennington, 381 U.S. 657 (1965). See note 196 and accompanying text, *infra*. To the same effect, see Lee, *A Survey of Professional Team Sport-Player-Control Mechanisms Under Antitrust and Labor Law Principles: Peace at Last*, 11 VAL. U.L. REV. 373, 415-16 (1977).

121. Mackey v. NFL, 543 F.2d at 616.

122. *Id.* at 615-16.

123. *Id.* at 616.

124. *Id.*

125. *Id.* at 623.

It also strongly suggested that any agreement reached through good faith bargaining on the subject of compensation for inter-team player movement would be immune from antitrust attack.[126] The case was remanded for further proceedings consistent with the opinion.[127]

Alexander v. NFL: Settlement of Players' Class Action Approved

During the period between the *Mackey* decisions, a class action was filed on behalf of all NFL players seeking damages caused by the operation of the Rozelle Rule.[128] The action, based on section 4 of the Clayton Act,[129] was filed with the same district judge, Judge Larson, who three months earlier had decided *Mackey*. The class action named the same defendants,[130] and alleged the same Sherman Act, section 1[131] violation as in the *Mackey* case. In short, the *Alexander* and *Mackey* cases have much more in common than merely bearing the name of the current NFLPA president as lead plaintiff.[132]

It was not until the Eighth Circuit's *Mackey* decision in October of 1976, outlining the prerequisites of the labor exemption, that the bargaining climate and the chances for settlement in the class action began to show real signs of progress.[133] For although the appellate court affirmed the NFL's antitrust liability, it also carved out a means of implementing a system of restraints on player movement immune from antitrust attack.[134]

126. *Id.* See note 197 and accompanying text, *infra*.

127. 543 F.2d at 623.

128. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730 (D. Minn. 1977), *aff'd sub nom.* Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978). As amended, the complaint described the plaintiff class as "all professional football players who have been under contract to one or more of the defendants at any time since September 17, 1972." Brief for Appellants at 4, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978) [hereinafter cited as *Brief for Appellants*].

129. 15 U.S.C. § 15 (1976).

130. The defendants in both instances were the NFL, all 26 member clubs (Tampa Bay and Seattle were not in the league during the tenure of the Rozelle Rule), and Commissioner Rozelle. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at p. 72,984.

131. 15 U.S.C. § 1 (1976).

132. John Mackey and Kermit Alexander were both NFLPA presidents. Brief for Appellees National Football League and Twenty-Six NFL Member Clubs, at 7 n.1, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978).

133. Brief for Appellants, *supra* note 128, at 32.

134. The three requirements for application of the labor exemption in Mackey, 543 F.2d at 613. See notes 113-23 and accompanying text, *supra*.

This gave the NFL an incentive to negotiate at arms-length with a player's association of roughly equivalent bargaining strength.[135] *Mackey* was the catalyst to reaching a collective bargaining agreement, ending over three years of labor strife in the NFL without an agreement.[136]

Also germane to the *Alexander* settlement was the NFL's pending petition in *Mackey* for certiorari with the United States Supreme Court. The Court never directly ruled on the petition, but it did carry the petition over to its next term upon being informed that a settlement in *Alexander* was before the district court for its approval.[137] As part of the settlement agreement, the NFL later withdrew its *Mackey* petition upon final court approval of the *Alexander* settlement.[138] The entire *Mackey* trial transcript, some 12,000 pages in length, was incorporated into the *Alexander* record.[139] As the district court made explicit, "The Court's evaluation of the proposed settlement has necessarily proceeded in the light of the *Mackey* trial and the decisions and further developments in that case."[140]

The plaintiff class was certified pursuant to Rule 23(b)(1)[141] and consisted of all football players under contract with NFL teams between September 17, 1972[142] and March 1, 1977. On the

135. As Dan Rooney, President of the Pittsburgh Steelers, testified, "I think we have to have a collective bargaining agreement with the Players Association in order to have a system [of player restraints]. I think that is what the Eighth Circuit Court and everyone else has said to us . . . you have to have someone bargaining for the players collectively and that is what gives us the insulation for being able to have a system." Brief for Appellants, *supra* note 128, at 33-34.

136. The previous collective bargaining agreement expired on Jan. 31, 1974 and the current agreement was reached on March 1, 1977. Brief for Appellants, *supra* note 128, at 27 n.47.

137. Brief for Appellees, National Football League and Twenty-Six NFL Member Clubs, at 8-9, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978).

138. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at p. 72,992 (D. Minn. 1977).

139. *Id.* at 72,986.

140. *Id.*

141. FED. R. CIV. P. 23(b)1:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

142. This date corresponds to the applicable three and one half year statute of limi-

latter date the NFLPA entered into a new Collective Bargaining Agreement with the NFL Management Council (NFLMC), the NFL member clubs' collective bargaining representative.[143] Simultaneously, a Stipulation and Settlement Agreement was reached by the parties in the *Alexander* class action.[144] The district court also determined that all the class action prerequisites[145] were present and that proper notice had been given before certification.[146]

Under the Settlement Agreement the NFL agreed to pay the plaintiff class $13,675,000.[147] This sum was to be divided among the plaintiff class according to a "point" allocation system, under which varying amounts of points were allotted for each year played depending on whether the player was a veteran or a rookie, on whether or not he had played out his option, and the relative strength of the rival World Football League in the year the option was played out.[148] The settlement fund was first divided by the total number of points outstanding, then

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tations period; suit was filed on March 16, 1976. Brief for Appellants, *supra* note 128, at 2 n.6.

143. Collective Bargaining Agreement, *supra* note 4, Preamble.

144. Although the class action was NFLPA-sponsored, and the class counsel, Ed Glennon, also was the NFLPA antitrust counsel, the plaintiff class represented the interests of all affected NFL players, whether NFLPA members or not. This is the basis for a conflict of interest argument raised on appeal. See note 173 and accompanying text, *infra*.

145. FED. R. CIV. P. 23(a) requires: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." The district court found the class, totaling about 5700, to have the requisite numerosity, that the claims of each class member involved common issues because the NFL had "acted on grounds generally applicable in substantially identical manner to all players in the NFL," that the claims of the 78 named plaintiffs were typical of the class, and that class interests were fairly and adequately represented. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at pp. 72,989-90 (D. Minn. 1977).

146. *Id.* at 72,986-89.

147. *Id.* at 72,992.

148. Specifically, each veteran player received one point for each season in question (1972-75) in which he received pension-vested credit, *e.g.*, played in three or more games. Draftees were given ⅛th of a point if they were drafted in 1973, 1/16th for the 1974 and 1975 seasons, and ¼th for the 1976 draft. Players who played out their options were awarded points as follows: for 1973 and 1977 free agents one point per year; for the 1974 and 1976 free agents, no points; and 1975 free agents ½ a point. Because the rival World Football League did sign some NFL players and draftees in 1974 and 1975, the points allotted to these years were correspondingly reduced in the belief that the presence of a viable WFL minimized restrictive impact of the Rozelle Rule. The rule was not in effect during the 1976 season. In addition, all named plaintiffs received one

each player was to receive compensation in the amount of the number of points earned multiplied by the value of a single point.[149] In return the plaintiff class and the NFLPA agreed not to sue with respect to the "NFL rules as they existed and will exist from the 1972 season through and including the duration of the current Collective Bargaining Agreement."[150] In turn, the NFL agreed to withdraw its petition for certiorari.

After reviewing the settlement provisions in light of both the uncertainties of litigation[151] and of the general desirability of settlement, the court gave its approval.[152] It found the settlement to be "fair, reasonable, and adequate."[153] Additionally, it refused a plaintiff class request to "retain jurisdiction over the Collective Bargaining Agreement" to watch over the operation of the new Right of First Refusal/Compensation Rule.[154] The court felt that when such disputes arose, they could be resolved in other forums.[155]

Reynolds v. NFL:[156] Objections to the Class Action Settlement

After the district court's approval of the Stipulation and Settlement Agreement, 16 members of the plaintiff class, all of

point. However, the *Mackey* plaintiffs were not awarded points, for they were compensated from a separate $2,200,000 fund specifically set aside for them. *Id.*

149. Judge Larson determined that 5,738.6 points were outstanding, and that each point was worth $2,382.99. *Id.* at 73,008.

150. *Id.* The Eighth Circuit concluded on appeal: "We are satisfied that the Covenant Not to Sue is superfluous insofar as the matters properly before the District Court in this class action are concerned." Reynolds v. NFL, 584 F.2d at 288.

151. The court identified three reasons for this uncertainty. First, the issue of liability had not been ultimately decided because the NFL's petition for certiorari was still pending. Second, in order to recover the treble damage award the plaintiffs would have to establish (1) an antitrust violation, (2) an injury to their business or property, and (3) a direct causal link between the two. Finally, the restrictiveness of the successor to the Rozelle Rule was also unknown. See notes 259-273 and accompanying text, *infra*. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at p. 72,994 (D. Minn. 1977).

152. *Id.* at 73,004.

153. *Id.* at 72,992-93. The "fair, reasonable, and adequate" standard was taken from Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975), *cert. denied* 423 U.S. 864 (1975).

154. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at pp. 73-008-09 (D. Minn. 1977). This decision was appealed by the plaintiff class. See notes 189-93 and accompanying text, *infra*. The Right of First Refusal/Compensation Rule, Collective Bargaining Agreement, *supra* note 4, art. XV [hereinafter referred to as the First Refusal Rule].

155. Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730, at p. 73,009 (D. Minn. 1977).

156. 584 F.2d 280 (8th Cir. 1978), *aff'g* Alexander v. NFL, 1977-2 Trade Cases ¶ 61,730 (D. Minn. 1977).

whom had previously objected to the terms of the proposed settlement, appealed.[157] Appellants were dissatisfied with the settlement in two respects. As above-average players, they believed their interests were not adequately represented by a plaintiff class consisting of all NFL players and sponsored by the player's union, the NFLPA.[158] Secondly, appellants contended that the new First Refusal Rule[159] was more onerous than its predecessor, the Rozelle Rule.[160]

The plaintiff class joined the NFL as appellees and settlement-proponents. However, the plaintiff class, although not desiring disturbance of the settlement approval, did become concerned over the operation of the First Refusal Rule,[161] and requested that the district court be instructed to retain jurisdiction over the implementation of the new rule.[162] The NFL completed this somewhat unusual procedural alignment by steadfastly arguing in favor of the settlement, including the fairness of the $13 million damage figure it was obligated to pay.[163]

The objector-appellants initially attacked the Rule 23(b)(1)

157. The objector-appellants consist of one inactive, and 15 active NFL players. Reynolds v. NFL, 584 F. Supp. at 280, 281. The appellants are: (1) Marvin Crenshaw, an inactive player concerned primarily with the Covenant Not to Sue; (2) Jack Reynolds, an above-average active player not represented by Howard Slusher; and (3) Charles Young, *et al.* (Adams, Barzilauskas, Carr, Clack, Cobb, Dutton, Fouts, Kunz, Mullins, Stallworth, Stokes, Swann, and White), all active players employing the same agent, Howard Slusher. Brief for Appellees National Football League and Twenty-Six NFL Member Clubs, at 12, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978); Brief for Appellants, *supra* note 128, at 23 n.43. Reynolds appears as the lead appellant because he was the first to file a notice of appeal. *Id.* at 23. Howard Slusher characterizes the owner-player relationship as similar to that of father and son. The owners like their players but have no respect for them. He currently represents about fifty players in their struggle to gain respect. One tactic he advocates is "withholding services." Referring to team owners, he continues, "the people who have the most to lose are the people with the long-term vested interests. And believe me they're bright enough to protect those interests. . . . They traditionally solve problems by passing rules. When R.C. Owens left San Francisco to play for Baltimore, they passed the Rozelle Rule. Now they'll figure out more rules to keep themselves in control." Goodman, *The Man General Managers Hate*, S.F. Chronicle, May 10, 1978, at 56, col. 6.

158. Brief for Appellants, *supra* note 128, at 51-68.

159. Collective Bargaining Agreement, *supra* note 4, art. XV.

160. Brief for Appellants, *supra* note 128, at 80.

161. Concern turned into strong dissatisfaction on the part of the NFLPA, and there was some talk of a player strike before the 1979 season. S.F. Examiner, Feb. 16, 1979, at 57, col. 4.

162. The plaintiff class filed a motion for remand of the case or a stay of the appeal proceedings. Reynolds v. NFL, 584 F.2d at 288-89. The circuit court denied it. See notes 189-93 and accompanying text, *infra*.

163. The amount of the damage award, $13,675,000 to the plaintiff class and $2,200,000

class action certification.[164] They first contended that the complaint sought only antitrust damages and that individual actions would not pose a possibility of inconsistent or incompatible standards of conduct as required under Rule 23(b)(1)[165] because the *Mackey* case had disposed of the liability issue.[166] Therefore, they proposed the proper class action form should have been Rule 23(b)(3).[167] However, Chief Circuit Judge Gibson disregarded the form of the complaint, and found the substance of the antitrust class action to be broadly based.[168] Only after the Collective Bargaining Agreement was reached did the need for injunctive relief dissolve.[169] Such relief was specifically sought in the original complaint.[170] An antitrust attack on the NFL's rules and practices governing player allocation, Judge Gibson concluded, "plainly encompassed the possibility that separate actions could set incompatible standards of conduct [and] might be dispositive of the interests of class members not parties to the actions . . . ."[171]

The requirements of a Rule 23(b)(1) class action were thus satisfied. However, common questions of law and fact appeared to predominate over individual ones,[172] and certification under Rule 23(b)(3) was also possible.[173] In such a situation,

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to the *Mackey* plaintiffs, was not seriously contested on appeal. *See* Brief for Appellants, *supra* note 128, at 45-92.

164. Reynolds v. NFL, 584 F.2d at 283. A thorough review of the class action issues is beyond the scope of this Note. Although appellants strenuously argued that deficiencies in the class action warranted a reversal, it is believed their chief object was to challenge the new player restraint, the First Refusal Rule. In the words of Chief Judge Gibson, "Appellant-objectors' primary complaint relates to Article XV of the collective bargaining agreement . . . ." *Id.* at 286-87. Hence the discussion here will merely summarize the class action issues.

165. FED. R. CIV. P. 23(b)(1)(A).

166. Brief for Appellants, *supra* note 128, at 46.

167. In addition to the traditional class action prerequisites, Rule 23(b)(3) requires that: "the court [find] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). See note 145, *supra*.

168. Reynolds v. NFL, 584 F.2d at 283.

169. *Id.*

170. *Id.* at 284.

171. *Id.*

172. Reynolds v. NFL, 584 F.2d at 284.

173. Appellants also argued that there were distinct and disparate groups within the plaintiff class representing antagonistic interests and warranting subclassification as allowed under Rule 23(c)(4)(B). Additionally, they alleged a conflict between the NFLPA's duty of fair representation of the majority interests of the bargaining unit and the fiduciary duty owed by the class representatives to all class members. Brief

presenting a choice between 23(b)(1) and 23(b)(3) certification, the court found that normally the former is preferable. Under Rule 23(b)(3) class members may "opt out"[174] resulting in the possibility that subsequent individual actions may be inconsistent with the class action determination.[175] Judge Gibson also determined that proper notice of the settlement was given.[176] Applying the judicial standard of review in class actions,[177] the court of appeals, according to the trial judge's views wide latitude, held that there was no abuse of discretion and affirmed the 23(b)(1) certification.[178]

In the evaluation of the terms of the settlement, the trial judge is afforded similar deference.[179] The issue on appeal was whether the district court committed a clear abuse of discretion in finding the settlement to be fair, reasonable, and adequate.[180] Appellants' principal contention was that the new First Refusal Rule was even more restrictive, because of its

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For Appellants, *supra* note 128, at 52, 55. The circuit court's response to both of the arguments was that the collective bargaining agreement was before Judge Larson "only to the extent necessary to determine whether the compromise [the settlement] should be approved. . . ." Reynolds v. NFL, 584 F.2d at 284. The court of appeals found no evidence to support the conflict of interest charges and agreed with the district court that "theoretical conflicts of interest did not require subclassification, disqualification of the named parties and class counsel, or disapproval of the settlement." *Id.* at 286. See notes 256-61 and accompanying text, *infra*.

174. FED. R. CIV. P. 23(c)(2) contains the so-called 'book of the month club' provision: "In any class action maintained under subdivision (b)(3), the court shall . . . advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion . . . ." Because individual class members may choose to pursue individual actions, the possibility of adjudications inconsistent with the class action determination arises.

175. The court cited 3B MOORE, FEDERAL PRACTICE ¶ 23.31[3] (1977), 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1772 at 7 (1972), and numerous cases. Reynolds v. NFL, 584 F.2d at 284.

176. "Appellants' argument contesting the adequacy of the notice given to the class members fails because it is premised upon this same misconception regarding the scope of the settlement approval. The District Court having properly determined that this case was maintainable as a class action under Rule 23(b)(1), the only notice to the class thereafter required was one of any proposed dismissal or compromise." *Id.* at 285.

177. Judge Gibson, quoting an earlier Eighth Circuit opinion, Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), *cert. denied* 423 U.S. 864 (1975), declared: "Only upon the clear showing that the district court abused its discretion will this court intervene to set aside a judicially approved class action settlement." *Id.* at 283.

178. *Id.* at 284-85.

179. *Id.* at 283-84.

180. *Id.* at 283, 287.

perpetual duration, than its predecessor, the Rozelle Rule.[181] The court of appeals found the record supported the contrary conclusion, because 168 players had played out their options under the new rule in two years, while only 176 had done so during the Rozelle Rule's eleven year existence.[182] He dismissed the idea of unrestricted player movement, apparently advocated by the appellants,[183] as ignoring the league structure and concluded that some rules restricting player movement are essential to league survival.[184]

It is important to remember that this consideration of a provision in the Collective Bargaining Agreement[185] was confined to its "bearing on the fairness of the settlement and the advisability of injunctive relief."[186] In this context the settlement was viewed as "fair, reasonable and substantial"[187] and the district court's approval was affirmed.[188]

Finally, the court turned to the plaintiff class's motion for remand or for a stay of the appeal, with instruction that the district court retain jurisdiction over the Collective Bargaining Agreement for the purposes of monitoring the First Refusal Rule.[189] The plaintiff class advocated this measure in order to ensure that the class received the rights secured by the settlement. But, unlike the objector-appellants, the plaintiff class was careful to spell out that the new rule, even without the re-

181. Brief for Appellants, *supra* note 128, at E1. See note 164, *supra*.

182. Reynolds v. NFL, 584 F.2d at 287. The court's argument here is superficial at best. The number of players playing out their options (becoming free agents) in a given year is not an indication of restrictiveness. The number of free agents actually able to switch teams is the determinative factor in judging freedom of player movement.

183. Appellants did offer some alternative mechanisms to regulate inter-team player movement. Brief for Appellants, *supra* note 128, at E8-E9.

184. Reynolds v. NFL, 584 F.2d at 287.

185. Collective Bargaining Agreement, *supra* note 4, art. XV.

186. Reynolds v. NFL, 584 F.2d at 288.

187. *Id.* at 287.

188. *Id.* at 289.

189. *Id.* at 288-89. *See* Brief of Appellees Kermit Alexander, *et al.* (Plaintiff Class), 46-49, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978). The district judge in the basketball player class action, involving similar procedural issues, followed such a practice. Robertson v. NBA, 556 F.2d 682 (2d Cir. 1977).

Judge Robert Carter retained jurisdiction over any disputes arising under the basketball collective bargaining agreement. Two years later he exercised this jurisdiction and overruled a compensation award rendered by NBA Commissioner Larry O'Brien. After the New York Knicks signed free agent Marvin Webster from the Seattle Supersonics, O'Brien ordered the Knicks to give up Lonnie Shelton, a 1979 first-round draft choice, and $450,000. Judge Carter ruled this to be excessive compensation. S.F. Chronicle, Sept. 20, 1979, at 63, col. 6.

quested monitoring safeguard, provided enough procedural improvements over the Rozelle Rule to "pass muster under the antitrust laws."[190] Appellants, of course, maintained that the refusal to have a full inquiry into the collective bargaining process warranted reversal of the settlement approval as well as the requested remand.[191] The NFL, on the other hand, contended that the Collective Bargaining Agreement was arrived at through arms-length bargaining, and that questions of interpretation and implementation of the new rule were merely union grievances and should be resolved through the machinery set out in the agreement.[192] Without deciding whether the correct procedure had been followed by the plaintiff class in making the motion, the court agreed with the NFL that the issue should be resolved through "normal channels of labor dispute resolution," and denied the motion.[193]

The court concluded by admonishing the parties to resolve future disputes through collective bargaining. It reasoned that when rules restraining player movement have been arrived at through arms-length bargaining, as appeared to be the case, they fall within the labor exemption to antitrust attack "and the merits of the bargaining agreement are not an issue for court determination."[194] This statement, taken in combination with his earlier remark that the Covenant Not to Sue was "superfluous,"[195] can leave little doubt that, at least in the Eighth Circuit, the First Refusal Rule is immune from antitrust attack.

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190. Brief of Appellees Kermit Alexander, *et al.* (Plaintiff Class) at 49, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978).

> It should be noted that *desirable* as class counsel believe the district court's retention of jurisdiction to be for the above specified reasons, class counsel do not share Objectors' apparent view that such a measure is *essential* in order for the new option compensation rule to comply with the criteria for a rule governing player movement that would be acceptable under the antitrust laws, which this Court delineated in the Mackey case.

Id. (emphasis in the original). The NFLPA no longer believes in the antitrust validity of the First Refusal Rule. See notes 237-39 and accompanying text, *infra*.

191. Brief for Appellants, *supra* note 128, at 93.

192. Opposition of Appellees National Football League and NFL Member Clubs to Motion of Appellee Plaintiff Class for Remand, or Alternatively, for a Stay at 2-3, 6, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1977).

193. Reynolds v. NFL, 584 F.2d at 289.

194. *Id.*

195. *Id.* at 288.

Reynolds: Analysis of What Was Stated and What Was Not

In order to understand fully the implications of *Reynolds*, it must be remembered that the Eighth Circuit also rendered the *Mackey* decision. *Reynolds* presented an opportunity for the court to reiterate the standards enunciated in *Mackey*, making plain its belief that the collective bargaining process was the proper vehicle for player-management dispute resolution.[196] Obliged to apply the antitrust laws in *Mackey* because of the absence of genuine arms-length bargaining, the *Reynolds* court was able to avoid any consideration of the antitrust validity of the new First Refusal Rule. Additionally, *Reynolds* allowed the court to announce, albeit in dicta, that the new rule was almost certain to fall under the protection of the labor exemption.[197] The significance of *Reynolds* lies not so much in what was articulated, but rather in what was not: the court's unspoken impatience with litigious athletes and the underlying sentiment that judicial restraint is now the appropriate posture in resolving professional team sport controversies.

Judicial Restraint

The *Mackey* case was initially hailed as a great victory for players' freedom.[198] Its real significance, however, lies in the labor exemption. The NFLPA, after having achieved its long-awaited freedom, bargained it away for greater financial reward under perhaps an even more restrictive player restraint rule.[199] The Rozelle Rule was a violation of the antitrust laws not because the players then had a less desirable minimum salary provision in the collective bargaining agreement to offset it, but because the rule artificially prevented the players

196. "We encourage the parties to resolve this question through collective bargaining. The parties are far better suited to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts." Mackey v. NFL, 543 F.2d at 623. "We emphasize today as we did in *Mackey, supra*, that the subject of player movement restrictions is a proper one for resolution in the collective bargaining context." Reynolds v. NFL, 580 F.2d at 289.

197. "Although we need not decide the question, it appears to be a near certainty that the collective bargaining agreement was the result of 'bona fide arms-length negotiations.'" *Id.* at 288. "[W]hen so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies, and the merits of the [collective] bargaining agreement are not an issue for court determination." *Id.* at 289. See note 218, *infra*.

198. See note 95 and accompanying text, *supra*.

199. See notes 227-38 and accompanying text, *infra*.

from receiving the value of their services in an open market.[200] The First Refusal Rule, on the other hand, was created through bargaining. Undeniably it has helped to raise salaries,[201] and, at least in theory,[202] the rule appears generally beneficial to player interests. Nonetheless, antitrust scrutiny would probably render the rule invalid.[203] The solution to this dilemma lies in the *Mackey* labor exemption.

Where collective agreement has been reached on a mandatory subject through arms-length bargaining, and the resulting provision primarily affects only the parties to the agreement, it is immune from antitrust attack.[204] No one is in a better position to appreciate the unique needs of professional football than its participants and team owners. The "bona fide arms-length bargaining" requirement has been criticized as an unwarranted judicial intrusion into the bargaining process.[205] But, as the *Mackey* case illustrated, the mere fact that a provision has been incorporated into a collective agreement does not ensure that it was the product of good faith bargaining.[206] During the most recent negotiations, proceeding in the aftermath of *Mackey* and its labor exemption, the NFL recognized the need to establish the NFLPA's bargaining strength in order to produce bona fide arms-length bargaining.[207] The *Mackey* labor exemption encourages at least the appearance of good faith bargaining and allows the courts to avoid areas of player-owner controversy not suited for judicial interference.[208]

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200. In general the antitrust laws are designed to protect competition, not competitors. Their goal is economic efficiency. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

201. Under the rule's first full year of operation in 1978, the average salary in the NFL rose 13.2% to $62,585. S.F. Chronicle, Jan. 31, 1979, at 55, col. 4.

202. The "right" of first refusal becomes necessary only when a player has received an offer from another team. Without an offer the First Refusal Rule never comes into play. Presently it appears that the NFLPA believes that owners are not exercising good faith in this regard. See note 223 and accompanying text, *infra*.

203. See notes 215-19 and accompanying text, *infra*.

204. Mackey v. NFL, 543 F.2d at 613-16.

205. *See* Note, *supra* note 76, 21 ST. LOUIS U. L.J. at 592. See note 114, *supra*. The argument is essentially that subjective judicial notions of fairness should not be allowed to upset the delicate balance achieved through collective bargaining.

206. 543 F.2d at 616.

207. In the current agreement the parties explicitly declare "that this agreement is the *product of bona fide, arms-length* collective *bargaining*." Collective Bargaining Agreement, *supra* note 4, Preamble (emphasis added). This is a verbatim repetition of Mackey's third requirement.

208. The league structure produces unique problems best resolved through collective bargaining. But this is not to say judicial restraint in all aspects of sports is always

Interestingly, after the *Reynolds* decision came down, the plaintiff class returned to District Judge Larson and made a Rule 60(b) motion[209] for relief from judgment alleging, *inter alia*, that newly-discovered evidence warranted reopening his decision to approve the settlement. The plaintiffs further alleged that the NFL owners had committed a "fraud on the court"[210] through their failure to disclose their interpretation of the First Refusal Rule under which they could exercise their right of first refusal on the same player year after year. This second allegation, if established, could have removed the rule from the protection of the labor exemption,[211] since if fraud were proved, the owners would not have been bargaining in good faith.

Judge Larson restated that the Collective Bargaining Agreement was not part of the settlement,[212] and denied the motion without addressing its merits.[213] Significantly, the objector-appellant (Reynolds *et al.*) did not join the plaintiff class, even though the class as a whole now seemed to share a dislike for the restrictive operation of the new rule.[214]

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desirable; the courts must continue to entertain actions in contract, tort, and other areas of traditional judicial expertise.

209. FED. R. CIV. P. 60 reads in relevant part:

> (b) Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . ; or (6) any other reason justifying relief from the operation of the judgment. . . ."

210. LAWDIBLE, Nov. 1978, at 4, col. 3.

211. Nevertheless, the NFLPA and the plaintiff class have agreed to the Covenant Not to Sue in the *Alexander* settlement. Therefore any suit against the First Refusal Rule would be frustrated in advance unless this covenant or the entire settlement were to be invalidated.

212. *See* Memorandum Order, at 2, Alexander v. NFL (No. 4-76-Civil 123) (D. Minn. Nov. 10, 1978).

213. *Id.*

214. LAWDIBLE, Nov. 1978, at 4. The NFLPA states:

> Perhaps the greatest irony in the whole Alexander-Reynolds scenario is that the Tochman [*sic*] and Slusher group failed to support the union's effort to preserve Larsen's [*sic*] jurisdiction over the new system. They took jurisdiction from Larsen [*sic*] in the first place by appealing the class action settlement, and, refused, during the appeal, to join in the union's efforts to have the case sent back to [*sic*]. Instead, they took an 'all or nothing' approach and said that the entire bargaining agreement should be thrown out. The result now is a Circuit Court decision unfavorable to all but the NFL owners, and no way to go other than arbitration or the Supreme Court.

The players are now saddled with a rule which they feel is both unfair and illegal under the antitrust laws.[215] They have exhausted the available avenues of legal recourse, and can only pursue their grievance through arbitration,[216] since *Mackey's* labor exemption precluded evaluation of their antitrust challenge on its merits. To understand the application of the labor exemption to the instant case, and to collectively bargained agreements in professional sports in general, an assessment of the First Refusal Rule is necessary. Specifically, an antitrust evaluation of the rule is warranted.

Although Judge Gibson in *Reynolds* stated, in dicta, that the First Refusal Rule was almost certainly the product of arms-length bargaining,[217] this should not end the inquiry.[218] The nonstatutory exemption, being a compromise between conflicting federal antitrust and labor policies, necessarily entails some balancing. Although unlikely, the First Refusal Rule may not be immune from antitrust attack if, on balance, the antitrust goals outweigh the federal preference for collective bargaining. Admittedly, by meeting all three of the *Mackey* prerequisites, the rule does represent very important labor interest; nevertheless, the antitrust aspects should still be evaluated. Ultimately, since the competing policies must be weighed, the determination must be on a case by case basis.[219]

Objector-appellants' counsel, Gerold Tockman, admitted to being torn between supporting the Rule 60(b) motion and pursuing the interests of his clients through more direct measures. Interview with Gerold Tockman, Nov. 15, 1978.

215. Memorandum Order, at 2, Alexander v. NFL (No. 4-76-Civil 123) (D. Minn. Nov. 10, 1978): "Essentially, class counsel wants to argue that the interpretation of the first refusal/player compensation rule violates *Mackey* and therefore the antitrust laws."

216. Collective Bargaining Agreement, *supra* note 4, art. II, § 2 allows submission of claims of lack of good faith negotiations to an outside arbitrator. The threatened player strike would have been in violation of the "No Strike/Lockout" provision (Art. III). See note 224, *infra*.

217. Reynolds v. NFL, 543 F.2d at 289.

218. *Reynolds* does seem to imply that the First Refusal Rule, if the product of arms-length bargaining, would automatically be immune. However, in the earlier *Mackey* decision, the same Eighth Circuit Court of Appeals carved out the boundaries of the labor exemption in the context of professional sports and emphasized that the three factors were merely "guiding principles" to facilitate its determination of the proper balance between the competing federal antitrust and labor policies. And the Supreme Court in Connell Co. v. Plumbers and Steamfitters, Local 100, 421 U.S. 616 (1975) made it plain that application of the nonstatutory exemption requires judical balancing. For a more in-depth discussion of whether the First Refusal Rule should receive protection under the labor exemption see Roberts & Powers, *supra* note 10, at 464-67.

219. See text accompanying note 111, *supra*.

Evaluation of the First Refusal Rule

Between the time of the class action settlement agreement, March 1, 1977, and the *Reynolds* appeal, submitted May 16, 1978, the NFLPA had the opportunity to assess the operation of the new rule governing free agent movement. It did not like what it saw. Only six of more than 120 free agents received offers from other clubs.[220] It was for this reason that the plaintiff class made its motion for remand or, alternatively, a stay of the appeal. The NFLPA and the plaintiff class strongly disagreed with the owners' interpretation of the First Refusal Rule. The Eighth Circuit ruled that this disagreement over contract interpretation did not constitute newly discovered evidence,[221] and denied the motion.[222] In the winter of 1979, the NFLPA was faced with an even more disappointing free agent market; at last count none of the 104 eligible free agents had received offers.[223] The NFLPA contemplated resort to its last recourse, the strike.[224]

In the *Reynolds* opinion, only a cursory analysis of the First Refusal Rule was undertaken.[225] Writing for the court, Judge Gibson pointed to the fact that more players had played out their options under the new rule, and opined that some form of restraint governing player movement appeared necessary.[226] A player does not gain his freedom playing out his option and becoming a free agent. Another NFL club must make an employment offer before a player may change teams. Therefore, the number of offers made to free agents, rather than the number of free agents, is the more valid indicator of freedom of movement.

The operation of the First Refusal Rule is more complex than that of its predecessor. In essence, the rule guarantees that all

220. Miller, *supra* note 60, at 45, col. 1.

221. "The only 'new evidence' or 'change in circumstance' is that the National Football League and its member clubs have interpreted the collective bargaining agreement in a manner different from that of the Players Association." Reynolds v. NFL, 584 F.2d at 288.

222. *Id.* at 289.

223. S.F. Examiner, Feb. 16, 1979, at 57, col. 4.

224. *Id.* Unlike the 1974 strike, this strike would have been specifically designed to shut down the regular season. *Id.* See note 69 and accompanying text, *supra*. Ed Garvey commented, "If you shut down the season for one game it would cost [the owners] in the neighborhood of $15 million." *Id.*

225. Again it must be emphasized that the First Refusal Rule was not before the court, except to the limited extent that it affected the reasonableness of the settlement.

226. Reynolds v. NFL, 584 F.2d at 287.

league players receive either the minimum salary,[227] or the best monetary offer"[228] that any team is willing to make. During a specified period,[229] free agents are allowed to negotiate with all interested NFL teams. When the player has selected the most desirable offer, the "principal terms"[230] are recorded on an official "offer sheet"[231] which is then filed with the league and the player's old club. Within seven days the old club must exercise its right of first refusal by matching the terms of the "offer sheet" in a new contract with the player, or it must let him transfer to the new club.[232]

In the latter event the old club will receive a predetermined draft choice (or choices) as compensation.[233] While the new rule is still supported by the same NFL reserve system devices, there is a significant change. Players with four or more years of experience no longer are required to have an option clause

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227. Minimum salaries are as follows:

	1979	1980
second year players	$24,000	$26,000
third year players	26,000	28,000
fourth year players	28,000	30,000
fifth year players	30,000	32,000

NFLPA MEMBERSHIP GUIDE '78/79 at 15.

228. Only "principal terms" are recorded in the offer sheet. These consist of (a) salary, (b) signing or reporting bonuses, and (c) any changes in the NFL player contract form. Collective Bargaining Agreement, *supra* note 4, art. XV, § 7.

229. February 1 to April 15. *Id.* §§ 2-3.

230. *Id.* § 7.

231. *Id.* § 6. Only one offer sheet may be outstanding on a player at a time. *Id.*

232. *Id.* § 5. In order to exercise its right a club must be eligible to do so. Eligibility is achieved when the player in question has been given either a "qualifying offer" by his old club by February 1, or an offer from another club (recorded on an offer sheet) by the April 15 deadline in at least the following amounts:

	1979	1980
Players with less than 4 years of league experience:	$30,000	$35,000
Players with less than 5 years:	40,000	40,000
Players with less than 6 years:	45,000	45,000

And increased by $5,000 for each additional year of league service. *Id.* § 10.

233. The amount of compensation is determined by the player's new salary as stated in the offer sheet. If the new salary is between: $50,000 and $64,999, the compensation is a 3rd-round choice; $65,000 and $74,999, the compensation is a 2nd-round choice; $75,000 and $124,999, the compensation is a 1st-round choice; $125,000 and $200,000, the compensation is a 1st and 2nd choice; more than $200,000, the compensation is two 1st choices. All the salary categories will increase in the 1980 season. *Id.* § 12.

in their contract.[234] There is also an "extreme personal hardship" provision[235] which enables a player to submit a non-injury grievance that could result in a denial of his old team's right of first refusal.[236]

This last provision appears to be the only way a team can be forced to let a player go. That is, a team may choose to exercise its right of first refusal every time a player becomes a free agent and submits an "offer sheet." The NFLPA particularly objects to this perpetual aspect of the rule.[237] It apparently interprets the rule to mean that a club can exercise it against each player only once.[238] However, this disagreement is

234. *Id.* art. XIV. The new agreement also provides for a minimum salary of 110 percent (instead of 90%) of the player's contract salary, during the option year.

The NFLPA has initiated an arbitration proceeding challenging the owner's asserted right to renew a player's contract at 110% of the salary provided in the contract in each of two or more consecutive years. At issue is the interpretation of art. XV, § 17, which reads in pertinent part:

> *Re-Signing*: If a veteran free agent receives no offer to sign a contract or contracts with a new NFL club pursuant to this Article, and his old club advises him in writing by June 1 that it desires to re-sign him, the player may, at his option within 15 days, sign either (a) a contract or contracts with his old club at its last best written offer given on or before February 1 of that year, or (b) a one-year contract (with no option year) with his old club at 110% of the salary provided in his contract for the last preceding year (if the player has just played out the option year, the rate will be 120%).

Collective Bargaining Agreement, *supra* note 4, art. XV, § 17.

The arbitration involved John Dutton, formerly with the Baltimore Colts, now with the Dallas Cowboys. Baltimore advised Dutton of its desire to re-sign before June 1 in both 1978 and 1979. Dutton selected option (b) and signed a one year contract for 1978-1979 but refused to do so again for 1979-1980. It should be noted that Dutton was given the requisite qualifying offer of the applicable minimum salary by the Colts each year. If the qualifying offer had not been made Dutton would have become a free agent on February 1.

Dutton and the NFLPA contended that a club cannot give notice of its desire to re-sign on more than one occasion. Otherwise, they argued, the option clause would be meaningless and a club could indefinitely bind its players in this manner. The NFL, on the other hand, contended that the language clearly gives member clubs that right. Arbitrator Bert Luskin was expected to render his decision by the end of 1979. Telephone conversation with NFLPA staff attorney, Aug. 24, 1979.

However, the arbitration decision was never rendered because Dutton was traded to the Dallas Cowboys where he finished the 1979 season. S.F. Chronicle, Oct. 10, 1979, at 65, col. 3.

235. " 'Personal hardship' is not defined, but it would include situations where the player alleged discrimination, or needs to be in a certain geographical area for valid personal reasons." NFLPA MEMBERSHIP GUIDE '78/79, at 31.

236. Collective Bargaining Agreement, *supra* note 4, art. XV, § 8.

237. Class counsel alleged that there was a "secret agreement" by the NFL owners to interpret article XV as a "perpetual option" in support of their Rule 60(b) motion before Judge Larson. *See* LAWDIBLE, Nov. 1968, at 4.

238. Interview with Gerold Tockman, Nov. 15, 1978.

dwarfed by the present controversy surrounding the sparse number of offers made to free agents. The NFLPA realizes that good faith offers are essential to the contemplated operation of the First Refusal Rule.

From an antitrust viewpoint it may be argued that the new rule has the desirable effect of forcing player salaries closer to the free market level. It is true that the players, the class damaged by the Rozelle Rule, are ensured of receiving more money under the First Refusal Rule. However, the new rule contains the same anticompetitive devices which were held to violate the antitrust laws in *Mackey*.[239]

It has been established that because of the business peculiarities of professional sports, the *per se* rule of antitrust liability should not be applied.[240] Analysis may proceed under the Rule of Reason,[241] which involves a balancing of the legitimate business purposes that are beneficial to competition, *i.e.*, procompetitive, and are promoted by the particular restraint against the anticompetitive effects of such restraint.[242] As was outlined earlier, it is unclear whether any of the proffered justifications for player restraints are actually promoted by employment of the restraints.[243] Here an important distinction must

239. The Rozelle Rule was found unduly restrictive in three respects: (1) its application to all players; (2) its unlimited, perpetual duration; and (3) its complete lack of procedural safeguards. The First Refusal Rule has made some improvements. It only applies to players who have received offers at certain minimum salary levels and it provides some procedural safeguards, *e.g.*, the "personal hardship" provision and the removal of the Commissioner's discretionary power. However, the new rule is totally unlimited in its scope and duration. Specifically, while the Rozelle Rule was implemented infrequently (when the teams could not reach a compromise on their own), and only after a player had changed teams, the First Refusal Rule may be used as many times as desired to block player transfers before the fact. The Rozelle Rule acted as a strong discouragement to player movement, but it could not stop all player transfers. Under the new rule, an owner can ensure his exclusive rights to a player's services for as long as he pleases. *See* Brief for Appellants, *supra* note 128, at E1-E8.

240. "The courts have consistently refused to invoke the boycott *per se* rule where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted activity manifested no purpose to exclude and in fact worked no exclusion of competitors." Smith v. Pro Football, Inc., 593 F.2d 1173, 1180 (D.C. Cir. 1978) (footnotes omitted).

241. *Id.* at 1182.

242. If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the 'anticompetitive evils' of the challenged practice must be carefully balanced against its 'procompetitive virtues' to ascertain whether the former outweigh the latter." Smith v. Pro Football, Inc., 593 F.2d at 1183.

243. See notes 19-32 and accompanying text, *supra*.

be made. The procompetitive effects to be balanced do not include any alleged promotion of competition on the playing field. The antitrust laws are only concerned with competition in the economic sense.[244] Although, theoretically, players will

244. The [NFL player] draft is allegedly 'procompetitive' in its effect on the playing field; but the NFL teams are not economic competitors on the playing field, and the draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at a lower cost. . . . In strict economic terms, the draft's demonstrated procompetitive effects are nil.

Smith v. Pro Football, Inc., 593 F.2d at 1186. For an in-depth analysis of the NFL and the history of the player draft, see *id.* at 1191-1222 (MacKinnon, J., concurring and dissenting).

The broader question of whether the NFL teams are competitors in the economic sense is not without some controversy. The league has often been characterized as a joint venture. Although this is not technically correct because the teams do not completely share their revenues, the analogy is appropriate to highlight the cooperation necessary between member clubs. Placing themselves under the joint venture label, however, does not automatically immunize the NFL from potential antitrust liability. As the court made plain in Los Angeles Memorial Coliseum v. NFL, 468 F. Supp. 154, 164 (C.D. Cal. 1979):

> Furthermore, even if the court accepts the contention that the NFL teams are joint venturers, this does not necessarily mean that they are not economic competitors for purposes of § 1 of the Sherman Act. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), the defendant companies attempted to justify the challenged restraints of trade by characterizing their operations as a joint venture. The Supreme Court rejected this argument:
>
> > Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.
>
> *Id.* at 598. Since the NFL teams are legally separate companies, the Supreme Court's reasoning would arguably apply to this case.
>
> The court concludes that competition for players and, depending on a team's location, competition for fans, indicate that the NFL teams are economic competitors, though not in the traditional sense.

Professional sports leagues have also been characterized as natural monopolies, industries or markets which reach their optimum level of economic efficiency when comprised of only a single firm. Smith v. Pro Football, Inc., 593 F.2d at 1195. However, even assuming this to be the case, there would still be economic competition to determine the sole surviving league and the antitrust laws would still be applicable to exercises of monopoly power. *See* WEISTART & LOWELL, THE LAW OF SPORTS, § 5.11(b)(ii) (1979).

These arguments will likely be raised again in the Oakland-Los Angeles Raiders litigation now pending. NFL v. Los Angeles Memorial Coliseum, No. 80-5156 (9th Cir. 1980). As of this writing, the Ninth Circuit Court of Appeals has stayed a lower court injunction prohibiting the enforcement of the NFL rule requiring approval by three-fourths of all team owners before a league franchise can be shifted from one city to another. The Raiders are contending the rule is an unreasonable restraint of trade in violation of the antitrust laws. S.F. Chronicle, Mar. 5, 1980, at 71, col. 5. Interestingly, no labor exemption issue is involved.

receive more for their services, under the First Refusal Rule, placing them closer to the monetary position they would likely occupy in a free market, it is not the result of increased competition for their services.[245] On the contrary, the increased player revenue is a product of fixed rules, not open competition.[246] Thus the new rule's arguably procompetitive effects[247] do not offset its restrictiveness, and it would likely be held invalid under a conventional Rule of Reason analysis.

On reflection, however, the hypothetical free market for player services becomes an impossibility. It is the structured nature of the NFL that ensures its high profits and the corresponding demand for players' services.[248] The league generates revenue through production of a standardized product,

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245. In *Smith*, the circuit court summarized the United States Supreme Court's latest word on the Rule of Reason, National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978):

> Ending decades of uncertainty as to the proper scope of the inquiry under the rule of reason, the Court stated categorically that the rule, contrary to its name, 'does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason,' and that the inquiry instead must be *confined to a consideration of [the restraint's] impact on competitive conditions.*'

Smith v. Pro Football, Inc., 593 F.2d at 1186 (emphasis added).

246. Initially, the First Refusal Rule appears to have the economically desirable effect of allowing the player's free market value—the "principle terms" of an "offer sheet"—to dictate the salary level. However, this is illusory. It is not a player's free market value, the amount of money a team is willing to pay him, that motivates another team to make an offer, but the amount of compensation—draft choices according to a predetermined schedule—that it will be forced to pay. In other words, the terms of an offer sheet do not reflect open competition for a player's services. Instead, they represent one team's decision that the player's services are worth the requisite amount of draft picks. Of course the salary level offered determines the compensation level and the two are positively correlated, as one increases so must the other.

In the final analysis it will be the free agent's value in terms of draft picks that will be decisive. Because the relative value of a team's draft choices depends on the previous years' won-lost record, as well as the owner's preference for "youth" or "veterans" and other intangibles, the salary level of an offer sheet will not necessarily correspond to the player's value in an open market for his services. Nevertheless, the First Refusal Rule (draft choice-competition) remains preferable to the Rozelle Rule (a commissioner's unbridled discretion).

247. Salaries will rise under the new rule, and the terms of an offer sheet should bear at least some relation to open competition.

248. [The argument for] complete, unrestricted freedom of movement from club to club, offering [a player's] services to the highest bidder . . . ignores the structured nature of any professional sport based on league competition. Precise and detailed rules must of necessity govern how the sport is played, the rules of the game, and the acquisition, number, and engagement of players.

Reynolds v. NFL, 584 F.2d at 287.

athletic contests played under uniform conditions. A league structure is essential.

NFL rules limit the number of players that may be employed by any team at a given time,[249] provide for "gate-sharing,"[250] and ensure equal division of television revenues among member clubs.[251] All of these measures are undoubtedly economically anticompetitive. However, they have not been the target of antitrust attack. They are rules designed to facilitate product uniformity and long-term league survival, to the benefit of both owners and players.

The Rozelle Rule was an overly restrictive device unilaterally imposed by the league. An antitrust analysis both highlighted the rule's inherent unfairness and also provided a means for its invalidation in *Mackey*. As a result, the players gained a real voice in league decision-making. However, as the First Refusal Rule demonstrates, league measures accommodating the needs of the players as well as the owners, although certainly more equitable, will not necessarily be more economically competitive.

The antitrust laws supplied the necessary leverage to enable the players to achieve what the owners had steadfastly refused: player input in formulating league rules.[252] The *Mackey*

249. NFL labor counsel Theodore Kheel once remarked:

> Now bear in mind that in professional sports no one has challenged the agreement of the teams that there should be a limitation on the number of players each team should employ. Can you imagine General Motors making an agreement with Chrysler . . . ? Can you imagine what the antitrust department would do if that kind of a [*sic*] agreement was entered into by companies subject to the antitrust laws?
>
> But no one has questioned for one moment that in an industry where teams are competing by agreement, not by the rules of competition as they apply in ordinary industries, where they agree that they will play the same number of games on substantially the same days and that they will seek to defeat each other in competition in order to come back next year and compete again, no one for one moment has said that the limitation on the number of players or any of these other restrictions on trade violate the antitrust laws. Because everyone realizes how ridiculous it would be if every team could go out and hire as many players as they want or pick the days on which they want to play. These restraints are accepted without challenge.

Panel Discussion, *Professional Sports: Has Antitrust Killed The Goose That Laid The Golden Egg?*, 45 ANTITRUST L.J. 290, 300-02 (1975) [hereinafter cited as *Panel Discussion*].

250. *Id.* at 313. Under "gate-sharing" the home team shares the ticket revenue with the visiting team.

251. See note 37 and accompanying text, *supra*.

252. During the *Panel Discussion*, *supra* note 249, at 309, Ira Millstein, plaintiff counsel in the basketball player class action, Robertson v. NBA, 556 F.2d 682 (2d Cir.

antitrust analysis produced welcome change. Today, however, the NFL still functions under similar anticompetitive rules. The fact that the players now have a greater voice in shaping the rules does not, by itself, make them any more procompetitive. As long as games played under uniform conditions are essential to team sport entertainment, league rules will be necessary to ensure a standardized product.

As a result, conventional antitrust analysis is not suited to evaluate the competitive impact of league rules. The very existence of the league negates the possibility of a free and open market for player services. As long as the league structure exists,[253] application of antitrust principles based on the desirability of open competition is not practical.[254]

Protection of the First Refusal Rule under the nonstatutory labor exemption would not seriously undermine antitrust policy. The continued existence of the NFL, and professional sports leagues in general, does not present an insurmountable obstacle to overall economic efficiency. Yet, these businesses do have a more conventional labor-management structure, and the absence of a collectively bargained employment agreement would contravene a strong national policy. On balance, the labor interests would likely prevail, and the First Refusal Rule should be immune from antitrust attack under the nonstatutory labor exemption. The dictum in *Reynolds* to that effect appears sound.[255]

In sum, *Mackey's* labor exemption provided a workable method of dealing with the antitrust challenge which lurked in

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1977), discussing a restraint often called the Basketball Rozelle Rule because of its similarity to the former NFL rule, commented:

> The antitrust laws are being used as the hammer to end, once and for all, a total package of restraints which made it impossible for a player to negotiate at least once in his professional career for his services with more than one team without any restraints . . . .
>
> Once it was agreed by the basketball owners that at least once during the life of a player's professional career, he would be able to competitively negotiate without restraints for his services, in my judgment the back of the problem was broken. The antitrust laws had been used properly to end that restraint, that single restraint which had so restrained players all of their professional careers.

253. Evaluation of the necessity or desirability of the league structure is beyond the scope of this note. Therefore it is assumed that no viable alterantive exists, and a league structure is indispensable in professional team sports.

254. The preceding analysis does not pertain to league merger questions, and is limited to league rules designed to foster the sport-entertainment product.

255. See notes 196-97 and accompanying text, *supra*.

the background of *Reynolds*. Yet the result there, although it was a collectively bargained settlement, was not wholly satisfactory. The problem stemmed from the players' failure to utilize their bargaining power effectively—a basic assumption behind the labor exemption. Their lack of solidarity was highlighted in the class action litigation, and overcoming this weakness poses perhaps the greatest challenge to future player gains.

The Class Action and Player Unity

While the problems presented by a class action on behalf of more than 5700 people are by no means unique to football players, they exemplify the NFLPA's difficulty in marshalling a unified strategy for presenting player demands. Although appellants' arguments contesting the class certification were meritorious,[256] the underlying motivation to appeal stemmed from disagreement with the NFLPA majority over acceptance of the new Collective Bargaining Agreement, and specifically the First Refusal Rule. The players were divided by factionalism during the settlement negotiations. Besides the objector-appellants, two groups advocating conflicting interests split the NFLPA into the "contract security" group and the "freedom" group.[257] The former desired a collective bargaining agreement and its financial security, while the latter valued free player movement more highly and consisted of many of the *Mackey* "Freedom Fighters."[258] This division in the players' ranks was apparently present on February 16, 1977, the date a preliminary collective bargaining understanding was reached.[259]

256. It is true, for instance, that above-average players like the appellants were damaged by the Rozelle Rule to a greater monetary extent than other players. Because 'star' players can command higher salaries, their injuries resulting from an inability to contract with the highest bidder were much larger than the average for all players. Yet under the settlement a player playing out his option in a given year was awarded the same amount regardless of ability or salary level. Of course, in the final analysis, a class action must always ignore special individual needs in order to achieve a workable resolution for the entire class. In other words, even if subclassing had been employed under Rule 23(c)(4), the highest-valued players would inevitably receive less than their total losses.

257. Brief for Appellants, *supra* note 128, at 56.

258. *Id.* Kermit Alexander, the NFLPA president at the time of the *Alexander* filing, was a plaintiff in *Mackey* and a member of the "freedom" group. His successor, Dick Anderson, was a leader of the "contract security" group, and is characterized by the appellants as executive director Garvey's "opponent." *Id.* at 29. See note 67, *supra*.

259. Brief for Appellants, *supra* note 128, at 57. Apparently Alexander walked out of

It was not surprising, then, that the *Reynolds* record contained an unusually large number of personal attacks. The principal allegation made in this regard was that class counsel was too intimately involved with the NFLPA to represent the class of all football players.[260] It was undisputed that class counsel's law firm was also counsel for the NFLPA.[261] However, no concrete evidence was introduced to show that this theoretical conflict hindered class counsel's fiduciary duty to fairly represent the entire class.[262]

The players thus lacked the necessary cohesion to utilize their bargaining power fully, both at the bargaining table and in the *Alexander* settlement negotiations. The problem was not unequal bargaining strength, but a failure on the players' part to focus their newly acquired strength.[263] The labor exemption was designed to foster arms-length collective bargaining. Viewed in this light, it is apparent that the exemption has served its purpose.

Although perhaps indirectly perpetuating some inequity here, the *Mackey* labor exemption can still be a workable answer to antitrust attacks and labor strife in professional sports if both sides fully exploit their bargaining positions. One other factor deserves consideration, however. While antitrust principles and labor policy protect the public as a whole, and are only secondarily concerned with the fate of particular litigants, *Mackey, Alexander* and *Reynolds* demonstrated a complete lack of concern for the effect of their decision on the general public. Once again, the professional sports business is unique in this regard. Not only are the teams accountable to their paying customers, the league as a whole is the object of intense public interest essential to the survival of the sport itself.

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the negotiations in frustration about three hours before final agreement was reached. *Id.* at 57 n.74. The Collective Bargaining Agreement was finalized on March 1, 1977.

260. *Id.* at 59-66.

261. Class Counsel, Ed Glennon, is a partner in the same Minneapolis law firm, Lindquist & Vennum, that serves as the NFLPA's general, labor, and antitrust counsel. *Id.* at 61 n.75. Interestingly, both District Judge Larson and NFLPA executive director Garvey were at one time associated with Lindquist & Vennum. Interview with counsel for appellants, Gerold Tockman, Nov. 15, 1978.

262. Reynolds v. NFL, 584 F.2d at 286.

263. The players may take some solace in the fact that professional football continues to enjoy tremendous popularity. If real unity can be achieved with the benefit of hindsight, the NFLPA should enjoy an enviable position at the bargaining table in 1982.

The Neglected Voice of the Public

Judge Gibson reminded the parties in *Reynolds* that "[p]rofessional sports are set up for the enjoyment of paying customers and not solely for the benefit of the owners or the benefit of the players."[264] The destiny of football is ultimately controlled by its fans: not only the fans actually attending the games, but, perhaps more significantly, those watching on television. The NFL negotiated a new television contract before the 1978 season under which each NFL team will receive $20 million over a four year period.[265] There has also been some speculation that the Super Bowl game may eventually be aired exclusively on pay television.[266] Continued public satisfaction is clearly in the economic interest of both owners and players.

How then may the public's interest be protected?[267] An obvious method is through government regulation. This might take the form of a national regulatory body under the auspices of some federal agency.[268] But such a national body is likely to be insensitive to local needs, and would inevitably evolve into a largely inefficient bureaucracy.[269] At least in the short run, the most desirable path appears to be through local legislation. Most teams enjoy stadium tax subsidies in some form,[270] and the majority of stadiums used by professional teams were built with public funds.[271] For example, legislation requiring reduced ticket prices for the community's poor and elderly might be a logical step. Each locality has its own priorities, and there is nothing in the league structure to prevent teams from being

264. Reynolds v. NFL, 584 F.2d at 287.

265. See note 37, *supra*.

266. *See* S.F. Chronicle, Jan. 23, 1969, at 37, col. 5.

267. The discussion following is equally applicable to all professional team sports, but only the barest outline of a few available alternatives is undertaken here. This is an area in need of a more exhaustive inquiry. *See* Note, *supra* note 28, at 77-96.

268. *Id.* at 82-95. For a detailed summary of public regulation of sports, see WEISTART & LOWELL, *supra* note 244, at §§ 2.01-2.22.

269. "Experience with public regulation in other agencies gives reason to doubt the wisdom of establishing a federal sports commission. In general, regulating bodies tend to give most of their attention to the interests of groups that are effectively represented in the formal proceedings of the agency, while overlooking the interests of groups that are not effectively represented." Noll, *supra* note 19, at 424.

270. "It is estimated that by charging low rents, foregoing property taxes, and paying the stadium's operating losses, local governments subsidize teams by more than $25 million annually." Kennedy & Williamson, *supra* note 18, at 71.

271. "70% of the stadiums and arenas used by pro franchises have been built with public funds, and they are piling up an indebtedness that will cost taxpayers some $6 billion through the turn of the 21st century." *Id.*

responsive to local needs. Nevertheless, in order to realize such measures, some type of fan coordination is necessary.

Much like the players in the late 1960's, fans must band together to accomplish real change. The Ralph Nader creation, F.A.N.S. (Fight to Advance the Nation's Sports), was a step in the right direction.[272] What is essential at a minimum is consumer awareness. Fans are the consumers of the professional sports entertainment product both at the stadium and on television. When consumers dislike an aspect of a product, and individual complaints are not effective, the way to be heard is through collective action. Local governments have to be responsive to their constituents, and professional sports teams to their attendance and television ratings. Through consumerism, the public interest in professional sports can be meaningfully represented.

Conclusion

The last two decades have witnessed momentous change in professional sports. No longer do team owners and league officials unilaterally dictate their sport's destiny. The players, through unionization and antitrust attacks, have gained a strong foothold in league decisionmaking.

Professional football has survived perhaps the most bitter conflict, but the struggle continues. The federal courts were drawn into the battle in *Mackey*, where the NFL's Rozelle Rule was found to be invalid under the antitrust laws. Recognizing the uniqueness of the business of football and the expertise of the parties involved, the *Mackey* court outlined a workable labor exemption to the antitrust laws. This exemption gives the

272. At this writing, F.A.N.S. remains largely dormant. Born as a Nader brain-child the organization soon fizzled into obscurity as a result of financial difficulties. During the spring of 1979, Ernie Wallerstein took over the reins and attempted to bring F.A.N.S. back to life. Unfortunately, he was unable to overcome the fundraising problems. Apparently neither the public nor the government is willing to supply the necessary financial backing, and fans seem unwilling to take collective action through boycotts, fundraising, or otherwise. Mr. Wallerstein has helped to accomplish some minor victories. Typical was the San Francisco Parks Department's reluctant decision to roll back hot dog prices by $.05 at Candlestick Park after much cajoling by Wallerstein and others. Presently, such actions can only be accomplished through individual efforts. There is simply not sufficient public interest to support an organization like F.A.N.S. However, Wallerstein does not believe that a government organization can be a viable alternative. Interview with Ernie Wallerstein, July 12, 1979. *See* Kazin, *FANS Makes Waves*, Berkeley Barb, Feb. 15-28, 1979, at 16, col. 1; Vincent, *Pro Team Sports Fans Demand Rights*, S.F. Sunday Chronicle & Examiner, Sept. 10, 1978, § B, at 3, col. 1.

judiciary a practical means of avoiding complex antitrust inquiries into the atypical economics of professional team sports. It is triggered when the challenged practice is the product of good faith negotiations on a mandatory subject of bargaining and affects primarily the players and the owners.

The *Mackey* labor exemption allows the players and owners to develop mutually acceptable rules on player movement without fear of antitrust liability. Judicial restraint is desirable in antitrust attacks on such rules. Regardless of the much-argued propriety of player restraints in professional team sports, they are not a suitable subject of antitrust examination. Team sports of necessity operate under a league structure, and although teams compete on the playing field, they must cooperate to produce a sound entertainment product. As contemplated in antitrust analysis, there will never be an open market for player services under a league structure.

The *Alexander-Reynolds* class action settlement is illustrative. Although the settlement was negotiated concurrently with a new Collective Bargaining Agreement adopting a rule arguably as restrictive as the Rozelle Rule, both courts steadfastly refused to evaluate the rule. The players may have received a less-than-desirable deal in the end, but this is primarily attributable to internal conflicts.

The players have fought hard to achieve a position of power roughly equivalent to that of the owners, and have succeeded, but the third party intimately involved in professional sports, the fans, are not represented. The public, the consumers of the sports-entertainment product, must band together to achieve a real voice in the future of professional sports. This can only be accomplished through consumerism—increased awareness and joint action. In this manner, professional team sports may eventually meet the needs of all three groups.